92-1969
NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IN RE: THE COLONY PLACE COMPANY,
Debtor

DORIS B. HARRISON,
Petitioner

versus

BANKERS FIRST FEDERAL
SAVINGS & LOAN ASSOCIATION,
Respondent

JAMES D. WALKER, JR.,
Trustee

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Doris B. Harrison , Petitioner Pro Se
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26 pp

Question Presented

Is a litigant denied due process when opposing counsel communicates ex parte with the Bankruptcy Judge on the merits of a contested matter with the intent to influence the court's impending decision; and, especially in light of Bankruptcy Rule 9003, should the resulting judgment in favor of the opposing party be set aside pursuant to Bankruptcy Rule 9024?

TABLE OF CONTENTS

	Page
Question Presented	First Page
Table of Authorities	iii
Opinions Below	2
Jurisdiction	3
Constututional Provision Involved . .	3
Statutes Involved	4
Statement of the Case	6
Reasons for Granting the Writ	14
Conclusion	25

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment 3

STATUTES

Title 11 U.S.C. §101, *et seq.* 14

Title 11 U.S.C., Chapter 7, §§701 *et seq.* 6

Title 28 U.S.C. §1254(1) 3

Title 28 U.S.C. §2075 14

Federal Rules of Bankruptcy Procedure, Rule 9003 . . . 5, 10, 15, 19, 20, 21, 22, 23, 24

Federal Rules of Bankruptcy Procedure, Rule 9024 . . . 4, 9, 22, 23

Federal Rules of Civil Procedure, Rule 60 . . . . . 4, 22, 23

Bankruptcy Reform Act of 1978 [Public Law 95-598(1978)] 24

TABLE OF AUTHORITIES
(Continued)

Page

CASES

In re Colony Square Co.,
819 F.2d 272 (11th Cir 1987),
cert. den'd 485 U.S. 977 (1988) . . . 19

Mineapolis, St. Paul & S.S. Marie
Ry Co. v. Moquin, 283 U.S. 520
(1931) 22

National Hockey League v. Metro-
politan Hockey Club, Inc.,
427 U.S. 639 (1976) 24

Rozier v. Ford Motor Co.,
573 F.2d 1332 (5th Cir. 1978) 22

In re Wisconsin Steel Company,
48 B.R. 753 (D.C. 1985) 19

OTHER AUTHORITIES

Collier on Bankruptcy,
Par. 9003.02 (15th Edit 1990) 16

Collier on Bankruptcy,
Par. 9003.03 (15th Edit 1990) 18

IN THE
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BANKERS FIRST FEDERAL
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Respondent

JAMES D. WALKER, JR.,
Trustee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, DORIS B. HARRISON, appearing pro se, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on November 27, 1992, rehearing denied March 1, 1993.

Opinions Below

The Judgement of the Court of Appeals, which affirmed without opinion, is set forth at *App* A-1.[1] The opinion of the District Court, which is unreported and which affirmed the judgment of the Bankruptcy Court is set forth at *App* B-1. The opinion of the Bankruptcy Court denying Petitioner's motion to set aside a previous judgment of that court is set forth at *App* C-1. The judgment which Petitioner seeks to have set aside is set forth at *App* H-1.

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[1] The reference is to the *Appendix* to this Petition at Page A-1, which is the method used throughout this petition in referring to the *Appendix*.

Jurisdiction

The Court of Appeals denied Petitioner's motion for rehearing on March 1, 1993. (*App* E-1). This Court has jurisdiction pursuant to Title 28 U.S.C. §1254(1).

Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

Federal Rules of Bankruptcy Procedure
Rule 9024

RELIEF FROM JUDGMENT OR ORDER

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by §727(e) of the Code, and (3) a complaint to revoke an order confirming a plain may be filed only within the time allowed by §1144, §1230, or §1330.

Federal Rules Of Civil Procedure
Rule 60

RELIEF FROM JUDGMENT OR ORDER

F.R.Civ.P. 60 reads in pertinent part as follows:

> (b) . . . On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 60 is set out verbatim in the *Appendix* to this Petition at *App* Q-1.

Federal Rules of Bankruptcy Procedure
Rule 9003

PROHIBITION OF EX PARTE CONTACTS

> (a) General Prohibition. Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communica-

tions with the court concerning matters affecting a particular case or proceeding.

(b) United States Trustee. Except as otherwise permitted by applicable law, the United States trustee and assistants to and employees or agents of the United States trustee shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communications with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.

Statement Of The Case

In this Chapter 7 bankruptcy case[1], Petitioner, as a shareholder of the

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[1] On September 1, 1988, The Colony Place Company, a Georgia corporation, was adjudicated bankrupt in the U. S. Bankruptcy Court for the Southern District of Georgia pursuant to and upon the federal jurisdiction conferred by Chapter 7, 11 U.S.C. §§701, *et seq.*

debtor, had objected to and was vehemently opposing Bankruptcy Court approval of a compromise of the debtor corporation's causes of action against Bankers First Federal Savings and Loan Association and was seeking to have those claims abandoned by the trustee. Petitioner was at the time attempting to prosecute the claims in state court. (*App* H-1). At the conclusion of an evidentiary hearing on September 18, 1989 on the bankruptcy trustee's application for approval of the compromise and Petitioner's motion for abandonment, the court took the matter under advisement. (*App* C-15). Two weeks later the Bankruptcy Judge asked Petitioner and Bankers First to submit "proposed findings of fact, conclusions of law and order supporting [their] . . . positions on the motion," by October 27, 1989, and invited all other interested parties to

do the same. (*App* L-1). On October 27, 1989, only petitioner and Bankers First submitted proposed orders to the court.

Counsel for Bankers First mailed a copy of its proposed order to petitioner by cover letter which referred only to the enclosed order. (*App* M-1). On the same day, counsel for Bankers First hand-delivered to the Bankruptcy Judge (1) its proposed order, (2) a package of documents intended to be in support of its order, and (3) a cover letter addressed to the judge explaining the enclosures and offering further assistance. (*App* N-1 and J-20). Petitioner was not served with a copy of the letter or the package. (*App* J-8). On November 30, 1989, without further hearing and without reviewing the official record (*App* J-20), the judge

signed an order denying Petitioner's motion and approving the compromise. (*App* H-1). The findings of fact, conclusions of law and order entered by the court were virtually identical to those submitted by Bankers First. (*App* J-12).

Petitioner promptly moved for a review of the court's order but her motion was denied as being untimely.[2] Petitioner then learned of the letter which Bankers First's counsel had sent to the judge. Based upon that discovery, on February 8, 1990, Petitioner brought her motion to set aside the judgment pursuant to Bankruptcy Rule 9024, asserting that the ex parte communication was in

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[2] Petitioner filed a motion to amend the judgment on December 15, 1989, but had failed to include the intervening Saturdays and Sundays in computing the 10-day time period for filing as required by a recent rule amendment. (*App* C-19).

violation of Bankruptcy Rule 9003 and had induced the trial court to make 31 specified errors of law and fact. (*App* K-1). In response to Petitioner's motion the bankruptcy judge (Judge Dalis) declared himself disqualified and referred disposition of the motion to the Senior Bankruptcy Judge (Judge Davis). (*App* D-1).

An evidentiary hearing on Petitioner's motion was held on February 28, 1990, before Judge Davis. Three members of the law firm of Hull, Towill, Norman and Barrett, namely, David E. Hudson, Lawton Jordan, Jr., and Mark S. Burgreen, appeared on behalf of Bankers

First in opposition to the motion.[3] After declining the opportunity to disqualify themselves as counsel for Bankers First, each of the attorneys testified under cross-examination. Their testimony established the facts upon which Petitioner's motion was based. Mr. Hudson, Mr. Jordan and Mr. Burgreen collaborated in preparing the proposed order. (*App* C-23). Mr. Jordan and Mr. Burgreen collaborated in assembling the package of material that was sent to Judge Dalis along with their proposed order. (*App* J-16). Mr. Jordan drafted the October 27th letter to Judge Dalis and saw to its delivery. (*App* J-21). Mr. Burgreen drafted the separate letter to

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3 James D. Walker, Jr., in his dual capacity as bankruptcy trustee and attorney for the bankruptcy trustee, also appeared in opposition. Petitioner and a creditor, D. Landrum Harrison, appeared pro se in support of the motion. The debtor was not represented. (*App* J-1).

Petitioner at Mr. Jordan's instruction. (*App* J-7). Neither witness could remember what the package contained, but testified that they thought it consisted of copies of cases, copies of selected pages from the transcript of the hearing before Judge Dalis, and copies of selected pages from the voluminous exhibits to the transcript which included several volumes of depositions with their numerous exhibits (*App* J-3 and J-17), all of which they said had been cited in their proposed order. The witnesses could not recall whether portions of the package had been highlighted, although the letter to Judge Dalis indicated they were "marked." (*App* J-16, J-29 and N-1). The package itself has never surfaced.

Judge Davis denied Petitioner's motion to set aside the order approving

the compromise, finding that no "prohibited" ex parte communication had taken place, that Petitioner had failed to show that the process was "fundamentally unfair," and that Judge Dalis had not abused his discretion in approving the compromise. (*App* C-1). Petitioner appealed to the District Court. The District Court adopted Judge Davis' findings and conclusions and affirmed the denial of Petitioner's motion to set aside the judgment. (*App* B-1). Petitioner appealed to the Circuit Court[4] which affirmed the District Court without opinion. (*App* A-1). Petitioner now applies to this Court for a Writ of Certiorari.

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[4] Petitioner moved the Circuit Court to disqualify the attorneys who had testified at the hearing before Judge Davis from arguing the appeal. Her motion was denied. (*App* G-1, F-1,J-2).

Reasons For Granting The Writ

The Eleventh Circuit Court of Appeals has sanctioned a departure by the lower courts from the accepted and usual course of judicial proceedings that calls for the exercise of this Court's power of supervision and the issue involved is an important question of federal law which should be addressed by this Court. Specifically, the lower courts have misinterpreted or misapplied a Bankruptcy Rule prescribed by this Court.

Pursuant to 28 U.S.C. §2075, this Court prescribed the general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases arising under the Bankruptcy Code, 11 U.S.C. §101, et seq. Among the rules thus promulgated is Bankruptcy Rule

9003 entitled "Prohibition of Ex Parte Contacts." The mere fact that this rule was included in the Federal Rules of Bankruptcy Procedure, when it has no counterpart in the Federal Rules of Civil Procedure, underscores its importance.

The rule provides in pertinent part that:

> Except as otherwise permitted by applicable law, . . . any attorney . . . of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

The Advisory Committee Note to Rule 9003 provides:

> This rule regulates the actions of parties in interest and their attorneys or others employed by parties in interest. This regulation of the conduct of parties in interest and their representative is designed to insure that the bankruptcy system operates fairly and that no appearance

> of unfairness is created. See H.Rep. No. 95-595, 95th Cong., 1st Sess. 95 et seq. (1977).
>
> This rule is not a substitute for or limitation of any applicable canon of professional responsibility or judicial conduct. See, *e.g.*, Canon 7, EC7-35, Disciplinary Rule 7-110(B) of the Code of Professional Responsibility: "Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party;: and Canon 3A(4) of the Code of Judicial Conduct: "A judge should ... neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding."

Collier on Bankruptcy Par. 9003.02 (15th Edit. 1990) explains the derivation of the rule as follows:

> Neither the former Bankruptcy Act nor the Bankruptcy Rules contained any provision regarding *ex parte* contacts between professionals or other parties in interest working on bankruptcy cases and in the

bankruptcy court. However, one of the motivating factors behind the Bankruptcy Reform Act of 1978 [Public Law 95-598(1978)] was the perceived unfairness of a system in which persons involved in bankruptcy cases had an advantage over strangers to the bankruptcy court because of their alleged familiarity and frequent contact with members of the bankruptcy bench. As stated in the Report which dealt with the House's predecessor bill to the Reform Act:

"Finally, there is a fourth class of problems. . . . There is an unusually close relationship between the bankruptcy judges and the bankruptcy bar, especially the debtors' and trustees' bars. They are in frequent contact with the judge as a result of the necessity for the judge's review of the administrative actions of the trustee or debtor in possession. Usually, a trustee is appointed by the bankruptcy judge, and is appointed in numerous cases before the same judge. Debtors' attorneys make frequent appearances in the same court representing numerous different debtors. All of these contacts and relationships have led to a feeling among nonbankruptcy practitioners that there is a 'bankruptcy ring' that has an

inside track on all bankruptcy matters, including the judges' favoritism." [H.R.Rep. No. 595, 95th Cong. 1st Sess. 95 (1977), reprinted in Appendix Vol. 2 *Collier on Bankruptcy* (15th Ed. 1988)].

The reasons set forth in the preceding excerpt, as well as the ethical rules referred to in the Advisory Committee Note, led to the promulgation of Rule 9003.

Par. 9003.03. In General.

Rule 9003 is simple and straightforward: unless there is a provision in applicable law with respect to contact between parties in interest and their professionals and the bankruptcy judge, no party in interest, or any attorney, accountant or employee of a party in interest, may indulge in *ex parte* meetings or communications with the judge before whom a case, contested matter, or adversary proceeding is pending concerning matters affecting the particular case or proceeding. Such *ex parte* meetings or communications are forbidden. Nothing in the rule prohibits communication with a judge, such as a letter or other written communication, as long as copies are sent to other parties in interest involved in the case or proceeding.

> The purpose of the rule is to bring bankruptcy proceedings more in line with the perceptions, and perhaps the reality, of nonbankruptcy civil litigation, where *ex parte* communication is infrequent and prohibited by appropriate canons of professional conduct.

The only judicial commentary that Petitioner has been able to find is that contained in In re Wisconsin Steel Company, 48 B.R. 753 (D.C. 1985).[5] After citing Rule 9003 and the relevant provisions of the Illinois Code of Professional Responsibility, the District Court said:

> The vice of *ex parte* communication is well illustrated by this case. It is rarely possible to prove to the satisfaction of the party excluded from

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[5] The Bankruptcy Court and the District Court in the case at bar relied heavily upon language contained in In re Colony Square Co., 819 F.2d 272 (11th Cir. 1987), *cert. den'd* 485 U.S. 977 (1988), and the lower court decisions in that case. However, that case did not address Rule 9003.

> the communication that nothing prejudicial occurred. The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declarations. This is why the prohibition is not against "prejudicial" *ex parte* communications, but against *ex parte* communications.

If Rule 9003 means what it says and if this Court prescribed the rule as The Advisory Committee and Colliers have suggested, then the case at bar presents a clear example of both the need for the rule and a violation of the rule. The lawyers for Bankers First put together a letter and what they intended to be persuasive documentation and delivered it to the undecided judge along with their proposed order. Not only did they do this without sending a copy to Petitioner - their only opposing party - they intentionally concealed it by sending her a <u>separate</u> letter with <u>only</u> a copy of

their proposed order enclosed. Both the Bankruptcy Court and the District Court interpreted Rule 9003 to allow this type of ex parte communication. (*App* C-37 and B-9). In other, words, they found that Rule 9003 permitted the sending of an ingratiating letter along with selected portions of the evidence to an undecided judge behind the back of the opposing party.

The lower courts went on to find that, even if the communication in question were not permitted by Rule 9003, the burden was on Petitioner to prove that it was "fundamentally unfair." (*App* B-10 and C-38). Long before Rule 9003 came into existence, this Court said that a litigant who has engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the

wrong inflicted upon his opponent." Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978), quoting from Minneapolis, St. Paul & S.S. Marie Ry Co. v. Moquin, 283 U.S. 520 (1931).

Neither of the lower courts recognized the special significance of Rule 9003, addressing instead the prevailing ethical considerations.[6] Nor did they consider Rule 9024, which adopts F.R.Civ.P. 60 (with only technical modifications which do not apply here) as broadened by the presence of its companion Rule 9003. Instead, they

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[6] Of course, ethical considerations and standards of professional conduct abound which proscribe ex parte contacts between lawyers and judges. See, for example, the State Bar of Georgia provisions at *App* P-1. However, Rule 9003 stands out as a clear and unequivocal statement by this Court that ex parte communications affecting a bankruptcy case are specifically prohibited.

applied the strict threshold requirements of F.R.Civ.P. 60(b)(3) without regard to the bankruptcy setting.

F.R.Civ.P. 60(b)(3) expressly provides that judgments may be set aside because of "misconduct of an adverse party." Bankruptcy Rule 9024 makes F.R.Civ.P. 60 a Bankruptcy Rule. Bankruptcy Rule 9003 defines and emphasizes a specific type of misconduct in bankruptcy cases: "Ex parte communications with the court concerning matters affecting a particular case or proceeding." Thus, Rule 9003 defines the evil and Rule 9024 provides the remedy. As this Court has said:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to

> deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

The lower courts in the case at bar have failed to grasp and implement both the intent of Congress and of this Court in the adoption of Rule 9003 as part of the Bankruptcy Reform Act of 1978 [Public Law 95-598(1978)].

This case does not involve a judgment that has been relied upon by innocent parties. In-house counsel for Bankers First was aware of the ex parte letter to the court. (*App* J-6). Furthermore, the judgment in question has been under attack since its inception. If it is set aside, Bankers First need

only start the approval process anew, hopefully without the benefit of ex parte communications with the court.

This case does involve the sanctity of judgments obtained in the federal courts. A judgment is the end result of all civil litigation. While there may be no perfect judgments, as Judge Davis suggests (*App* C-40)., that is no reason to preserve a judgment that is perfectly tainted by lawyer misconduct that has been expressly proscribed by this Court.

Conclusion

Fundamental to the Constitutional guarantee of due process is fair play. While an adversarial system requires a litigant to seek every advantage over his opponent, an advantage cannot be gained

at the expense of the rules.

Most rules are easily enforced because violations of them are immediately apparent to the other parties. Such was the case when Petitioner belatedly filed her motion to correct the judgment below. The penalty was promptly and sua sponte administered by the trial court's dismissal of her motion.

However, the rule violation presented by this petition falls into a different category. Ex parte communications with the court are by their very nature concealed from the view of the opposing party. Their discovery is likely to be a matter of chance. Indeed, fate intervened in the case at bar. The breach was discovered.

Petitioner brought the matter to the attention of the lower courts who chose to rewrite the rule rather than enforce it. She now brings the question of the meaning and purpose of Bankruptcy Rule 9003 to the Court of its origin.

This Court should, and Petitioner prays that it will, exercise its authority by granting the Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Decision of the 11th Circuit A-1

Decision of the District Court B-1

Decision of the Bankruptcy Court (Judge Davis) C-1

Sua Sponte Disqualification of Judge Dalis D-1

11th Circuit Denial of Rehearing E-1

11th Circuit Denial of Petitioner's Motion to Disqualify Counsel F-1

Petitioner's Motion to Disqualify Counsel for Bankers First G-1

Order of Judge Dalis Approving Trustee/Bankers First Compromise H-1

Trustee/Bankers First Agreement to Compromise Claims of Debtor I-1

Excerpts from Hearing before Judge Davis on Petitioner's Rule 9024 Motion J-1

Petitioner's Rule 9024 Motion K-1

Judge Dalis' October 2, 1989 Letter Requesting Proposed Orders L-1

(Continued)

APPENDIX

TABLE OF CONTENTS

(Continued)

Mr. Burgreen's October 27, 1989
Letter to Petitioner M-1

Mr. Jordan's October 27, 1989
Letter to Judge Dalis N-1

Bankers First's Response to
Petitioner's Rule 9024 Motion O-1

Relevant Provisions of State Bar
of Georgia Code of Professional
Responsibility P-1

Federal Rule Of Civil Procedure 60 .. Q-1

DO NOT PUBLISH

CORRECTED

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8173
Non-Argument Calendar

D. C. Docket No. 90-CV 110

IN RE: THE COLONY PLACE COMPANY, Debtor

DORIS B. HARRISON, Plaintiff-Appellant,

versus

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant-Appellee,

JAMES D. WALKER, JR., Trustee.

Appeal from the United States
District Court For the Southern
District of Georgia

(November 27, 1992)

Before HATCHETT and EDMONDSON, Circuit Judges and JOHNSON, Senior Circuit Judge.

PER CURIAM:

Affirmed. See 11th Circuit Rule 36-1.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

IN RE: THE COLONY PLACE COMPANY, Debtor

DORIS B. HARRISON, Appellant

vs.

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION and JAMES D. WALKER, JR., Trustee, Appellees

CHAPTER 7 BANKRUPTCY
CASE NO. 88-10819

CIVIL ACTION
CV 190-110

Date filed: January 15, 1992

O R D E R

This case involves a bankruptcy proceeding filed pursuant to Chapter 7 of the United States Bankruptcy Code ("the Bankruptcy Code"). Before the Court is Doris Harrison's ("Appellant") appeal of a April 4, 1990, Order entered in Chapter 7 Bankruptcy Case No. 88-10819 denying Appellant's Motion to Set Aside

Judgment.[1] I will begin by setting forth a chronology of the events which led to this appeal.

I. BACKGROUND

On August 24, 1989, in the United States Bankruptcy Court for the Southern District of Georgia ("the Bankruptcy Court"), James D. Walker, Jr. ("the Trustee"), the trustee in bankruptcy for the debtor, The Colony Place Company, filed an application to comprise a controversy between the debtor and Bankers First Federal Savings and Loan Association ("Bankers First"), an unsecured creditor. On July 17, 1989, Appellant moved the Bankruptcy Court to compel the Trustee to abandon any interest in Civil Action Number

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1. Doris Harrison is an interested party because she owns 20% of the outstanding shares of the debtor corporation.

89-RCCV-327 in the Superior Court for Richmond County. Appellant and her husband filed this suit in state court against Bankers First alleging that Bankers First was responsible for the failure of the debtor's condominium project. Bankers First had provided the financing for this project.[2] On September 18, 1989, the Honorable John S. Dalis, United States Bankruptcy Judge for the Southern District of Georgia, held a hearing to consider the Trustee's August

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2. This was the second application to compromise controversy filed by the Trustee. The Trustee filed his first application to compromise controversy on January 17, 1989. Judge Dalis heard arguments concerning the first application on July 5, 1989. Appellant appeared pro se in opposition. This matter was continued to July 10, 1989, at the request of the Trustee. The Trustee filed the August 24, 1989, Application to Compromise Controversy instead of proceeding with the first application to compromise controversy after Appellant filed her July 17, 1989, motion.

24, 1989, Application to Compromise Controversy and Appellant's July 17, 1989, motion. Appellant appeared pro se at this hearing in opposition to the Trustee's application to compromise controversy.

On October 2, 1989, Judge Dalis requested that both sides submit proposed findings of fact, conclusions of law and orders. (Transcript of February 28, 1990, Hearing, Case No.88-10819, p. 10-11.) On October 27, 1989, counsel for Bankers First submitted their proposed order (the "Proposed Order"). Counsel for Bankers First attached copies of the cases and excerpts from the transcript of the September 18, 1989, hearing to its Proposed Order. (Transcript of February 28, 1990, Hearing, Case No. 88-10819, p. 28.) In addition, counsel for Bankers First enclosed a letter explaining these

attachments. (Movant's Exhibit A, February 8, 1990, Motion to Set Aside Judgment.) Counsel for Bankers First sent a copy of the Proposed Order to Appellant on November 6, 1989, but did not enclose copies of the cases, excerpts from the transcript of the hearing or a copy of the October 27, 1989, letter to Judge Dalis. By Order entered November 30, 1989, Judge Dalis approved the Trustee's application to compromise controversy and denied Appellant's Motion to Compel the Trustee to Abandon the Estate's Interest in the controversy in Civil Action Number 89-RCCV-327.

On February 8, 1990, Appellant filed a Motion to Set Aside Judgment pursuant to Bankruptcy Rule 9024 which adopts Federal Rule of Civil Procedure 60 in

cases brought under the Bankruptcy Code.[3] In support of her motion, Appellant alleged that counsel for Bankers First communicated ex parte with Judge Dalis concerning this case, thereby violating Bankruptcy Rule 9003. Specifically, Appellant contended that the October 27, 1989, letter with attachments sent to Judge Dalis by counsel for Bankers First constituted an impermissible ex parte communication. Judge Dalis recused himself on this matter by Ordered entered February 21, 1990.

On the same date, the matter was assigned to the Honorable Lamar W. Davis, Jr., Chief United States Bankruptcy Judge

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3. In her motion, Appellant incorrectly refers to the "judgment entered December 1, 1990." No order was entered on December 1, 1990. Thus, I conclude that Appellant is referring to the November 30, 1989, Order concerning the Trustee's application to compromise the Bankers First controversy.

for the Southern District of Georgia. Judge Davis held a hearing on Appellant's motion on February 28, 1990. By an Order entered April 4, 1990, Judge Davis denied Appellant's Motion to Set Aside Judgment. Judge Davis based his ruling on the following conclusions: (1) no prohibited ex parte communication occurred when Bankers First submitted copies of the cases, excerpts of the transcript and letter of explanation to Judge Dalis; (2) even if this constituted prohibited ex parte communication, Appellant has not shown that the process was fundamentally unfair as required under Bankruptcy Rule 9024; and (3) Judge Dalis did not abuse his discretion in approving the compromise. Appellant appeals the April 4, 1990, Order to this Court.

II. FINDINGS OF FACT

A district court shall not disturb the findings of fact of the bankruptcy judge unless such findings are clearly erroneous. Bankruptcy Rule 8013. See also Re Securities Group, 926 F.2d 1051, 1055 (11th Cir. 1991). After reviewing the record, I agree with the findings of fact of Judge Davis. The October 27, 1989, letter sent by counsel for Bankers First simply explained the attachments. The attachments consisted of copies of case law and portions of the September 18, 1989, hearing transcript relied upon in Bankers First's Proposed Order. Appellant suggests that the October 27, 1989, letter contained more than this; however, she has failed to present any evidence to contradict the findings of fact made by Judge Davis.

The cases and the transcript of the September 18, 1989, hearing were available to Appellant. Appellant received a copy of the Proposed Order as evidenced by the record. Appellant undoubtedly read the Proposed Order. Clearly, Appellant could have read the cases cited by Bankers First in the Proposed Order. In addition, the original transcript of the September 18, 1989, hearing was available in the office of the Clerk of the Court. Thus, Appellant had access to both the cases and transcript of the September 18, 1989, hearing which Bankers First provided to Judge Dalis. Appellant did not have access to the letter sent by Bankers First to Judge Dalis with the Proposed Order. However, after reviewing this letter, I find that it merely explained the attachments to the Proposed Order. Accordingly, I find that no prohibited ex

parte communication occurred.

III. CONCLUSIONS OF LAW

To set aside a judgment pursuant to Bankruptcy Rule 9024, the moving party must demonstrate that the process by which the judge arrived at this decision was fundamentally unfair. See Colony Square Co. v. Prudential Insurance Co. of America, 819 F.2d 272 (11th Cir. 1987); West v. Love, 776 F.2d 170 (5th Cir. 1985). In this case, Appellant has failed to show that Judge Dalis' decision-making process was fundamentally unfair. Appellant had access to the cases and excerpts which Bankers First submitted to Judge Dalis. Bankers First sent Appellant a copy of the Proposed Order on October 27, 1989. Therefore, Appellant could easily have read the cases which were submitted to Judge Dalis. Even if Appellant did not have

access to a private law library, she could have read the cases at one of the county law libraries in the area.

Regarding the excerpts of the transcript of the September 18, 1989 hearing, the entire transcript was made part of the record on October 27, 1989. This transcript was available to the public in the office of the Clerk of Court. Therefore, I conclude that the courtesy copies of case law and excerpts of the transcript of the September 18, 1989, hearing which Bankers First relied upon do not constitute prohibited ex parte communication.

Even if the communication by counsel for Bankers First constituted an ex parte communication, such communication is not per se prohibited in this circuit. In Colony Square, 819 F.2d at 273, two

orders of the bankruptcy court were "ghostwritten" by counsel for Prudential at the direction of the bankruptcy judge. Colony Square was not informed that counsel for Prudential had drafted the orders nor was it given an opportunity to respond to Prudential's proposed orders. While an ex parte communication occurred, the Court refused to set aside the lower court's judgment because Colony Square failed to show that the process by which the judge arrived at his decision was fundamentally unfair. Id. at 277.

In this case, the process used by Judge Dalis was not fundamentally unfair. Appellant participated in a hearing on September 18, 1989. She had the opportunity to present witnesses and arguments. (Transcript of February 28, 1990, Hearing, Case No. 88-10819.) In addition, both parties submitted proposed

findings of facts, conclusions of law and orders at Judge Dalis' direction. Although counsel for Bankers First did not provide Appellant with copies of the cases and excerpts of the transcript provided to Judge Dalis, she had access to these materials since Bankers First relied on them in its Proposed Order.

Appellant's Motion to Set Aside Judgment was also denied because Judge Davis concluded that Judge Dalis did not abuse his discretion in approving the compromise recommended by the Trustee in his August 24, 1989, Application to Compromise Controversy. The decision of the bankruptcy judge in approving or disapproving a compromise agreement rests in the sound discretion of the judge. Such a decision should not be set aside unless there is an abuse of discretion. Collier on Bankruptcy, § 9019.03 at

9019-4-5 (15th Ed. 1989).

Here, Judge Dalis presided over a hearing and reviewed the proposed orders submitted by both parties before reaching his decision. Contrary to Appellant's assertions, the findings of fact and conclusions of law set forth in the November 30, 1989, Order, are supported by the evidence in the record. Judge Dalis did not abuse his discretion in this case.

Appellant further contends that Judge Dalis never read the transcript of the September 18, 1989, and the depositions relied upon by Judge Dalis in the November 30, 1989, Order. While Judge Dalis may not have read the transcript, he presided over a lengthy hearing concerning the proposed compromise and undoubtedly fully reviewed

the proposed orders submitted by the parties. Thus, it may have been unnecessary for Judge Dalis to review the transcript or the deposition. As previously indicated, the findings of fact and conclusions of law of Judge Dalis are clearly supported by the record.

While I agree with Judge Davis that counsel for Bankers First should have provided all the attachments that it provided to the court to opposing parties, no improper ex parte communication occurred in this case. Accordingly, the April 4, 1990, Order denying Appellant's Motion to Set Aside Judgment in Chapter 7 Case Number 88-10819 is AFFIRMED in all respects.

ORDER ENTERED at Augusta, Georgia, this 15th day of January, 1992.

BEST AVA

/s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

IN RE: THE COLONY PLACE COMPANY, Debtor

DORIS B. HARRISON, Appellant

vs.

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION and JAMES D. WALKER, JR., Trustee, Appellees

CHAPTER 7 BANKRUPTCY
CASE NO. 88-10819

CIVIL ACTION
CV 190-110

J U D G M E N T

This action came on for consideration before the Court, the Honorable Dudley H. Bowen, Jr., District Judge, presiding, and the issues having been duly considered and a decision having been rendered,

ABLE COPY

IT IS ORDERED AND ADJUDGED that in accordance with said decision, the April 4, 1990 Order denying Appellant's Motion to Set Aside Judgment in Chapter 7 Case Number 88-10819 is AFFIRMED in all respects.

DATED at Augusta, Georgia, this 15th day of January, 1992.

HENRY R. CRUMLEY, JR., CLERK
UNITED STATES DISTRICT COURT

By: /s/ Scarlett B. Collins
Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

In the matter of:

THE COLONY PLACE COMPANY, Debtor

DORIS B. HARRISON, Movant

v.

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION and JAMES D. WALKER, JR., TRUSTEE, Respondents

Chapter 7 Case
Number 88-10819

Date filed: April 4, 1990

MEMORANDUM AND ORDER
ON MOTION TO SET ASIDE JUDGMENT

Doris B. Harrison filed a Motion to Set Aside the Judgment of the Honorable John S. Dalis, United States Bankruptcy Judge, dated November 30, 1989, pursuant to Bankruptcy Rule 9024, said Motion having been filed on February 8, 1990. By Order dated February 21, 1990, Judge

Dalis recused himself and the matter was assigned to me. A hearing was conducted in Augusta, Georgia, on February 28, 1990, and after consideration of the evidence introduced at that hearing, together with applicable authorities and the argument of counsel, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Ms. Harrison's Motion asserts that under Bankruptcy Rule 9024, which adopts F.R.C.P. 60, the judgment should be set aside. Subsection (b)(3) of Rule 60 provides:

> On motion and such terms as are just the court may relieve a party . . . from a final . . . order . . . for the following reasons: (3) Fraud . . . misrepresentation or other misconduct of an adverse party.

The rule goes on to provide that such a motion shall be made within a reasonable time and not more than one year after the order was entered.

The specific misconduct alleged in Ms. Harrison's motion is that "an attorney for Bankers First Federal Savings and Loan Association intentionally communicated ex parte with the Court concerning this case in violation of Bankruptcy Rule 9003." From the evidence adduced at the hearing and taking judicial notice of certain documents in this Court's file, the history of the case is as follows:

On August 24, 1989, James D. Walker, Jr., Trustee in this case, filed an Application to Compromise a Controversy between the Debtor corporation and Bankers First Federal Savings and Loan Association ("Bankers First"). The terms

of the proposed compromise were set forth in a notice to creditors and other parties in interest issued by the Clerk of this Court on August 29, 1989, which set a hearing to consider the application for September 18, 1989, at 9:00 o'clock a.m.

This controversy had been the subject of a previous application by the Trustee for approval of compromise filed January 17, 1989, scheduled for hearing on July 5, 1989. At that time an objection was interposed to the proposed compromise by Doris B. Harrison, a shareholder of the Debtor corporation. Appearing at the hearing on July 5th in addition to Ms. Harrison was D. Landrum Harrison who attempted to enter an appearance in opposition to the proposed compromise on behalf of Landor Condominium Consultants, Inc. Judge

Dalis ruled that Mr. Harrison, a former attorney, could not enter an appearance on behalf of the corporation. At the request of the Trustee, the matter was continued to July 10, 1989, so that expert testimony regarding valuation of the real estate, the subject of the compromise, could be procured. On July 17, 1989, Doris B. Harrison filed a motion asking the Court to order the Trustee to abandon a certain pending civil action asserted by Doris B. Harrison and Landor Condominium Consultants, Inc., in the Superior Court of Richmond County, denominated as Civil Action Number 89-RCCV-327, and captioned Landor Condominium Consultants, Inc., and Doris B. Harrison, in her capacity as a shareholder of The Colony Place Company v. Bankers First Federal Savings and Loan Association, et al. Apparently the

Trustee did not pursue the initial application to compromise controversy but, instead, filed a second Application to Compromise on August 24, 1989. On August 28, 1989, the Trustee filed an objection to the motion of Doris B. Harrison which sought to compel the Trustee to abandon the aforementioned cause of action. Objections to Ms. Harrison's Motion to Compel Abandonment were also filed on behalf of Smith Brothers Mechanical Contractors, David Roper, and Harold Fowler, all parties in interest in the proceeding.

A hearing to consider the Trustee's second application to compromise controversy and a hearing on Ms. Harrison's Motion to Compel Abandonment of the Superior Court civil litigation were scheduled for the same date and time. On September 14, 1989, an

objection to the Trustee's second application to compromise was filed by The Colony Place Company (the Debtor) and joined in by Doris B. Harrison, Richard R. Bird, Annemarie S. Bird, James C. Harrison, III, and Marie W. Harrison. That pleading was signed by Doris B. Harrison, Richard R. Bird, Annemarie S. Bird, and by D. L. Harrison "as attorney in fact for James C. Harrison, III and Marie W. Harrison." The objection was not signed by an attorney for the Debtor corporation.

Indeed, on September 13, 1989, J. Patrick Claiborne, attorney for the Debtor, had filed a motion to withdraw as counsel. The motion asserted that the Debtor had five shareholders and at the time Claiborne was retained to represent the Debtor "there existed and still exists today a strong division among the

shareholders as to what constituted the best interest of the corporation and what action the corporation should take." The motion to withdraw went on to set forth that Movant Claiborne had been hired to represent the Debtor corporation by Harold Fowler who had been elected president with the support of 60% of the shareholders. The motion went on to state:

> Bankers First is a creditor of the debtor and of the individual shareholders. There exists among the shareholders apparent irreconcilable differences as to how to deal with Bankers First claims against the corporation and the individual shareholders. In addition Fowler and Roper [two of the shareholders] believe that Harrison and his wife [a shareholder] have misappropriated assets of the debtor and that a turnover action should be prosecuted. The Trustee has instituted and is presently maintaining a turnover proceeding against Harrison and his wife to recover said assets.

The motion further states that just prior to the filing of the motion to withdraw, Harrison had notified Claiborne that Harrison had been elected by the shareholders to replace Fowler as president. Claiborne had also been advised by the Chapter 7 Trustee, James D. Walker, Jr., that he did not intend to retain Mr. Claiborne to represent the Debtor in continuing proceedings in this bankruptcy case. Mr. Claiborne concluded that inasmuch as the Trustee had been placed in control of the Debtor corporation's affairs, Claiborne no longer had standing to represent Debtor in this matter. He also felt and so informed Mr. and Mrs. Harrison that due to the conflict among the shareholders, he believed any effort to continue to represent the Debtor would constitute a conflict of interest on his part.

Claiborne showed that he had obtained an informal advisory opinion from the Office of General Counsel of the State Bar of Georgia which was supportive of his conclusion and prayed that the Court permit him to withdraw as attorney of record for the Debtor.

On September 15, 1989, Judge Dalis signed an Order granting the Motion to Withdraw, finding that the Trustee had not retained Mr. Claiborne, that Mr. Claiborne no longer had any duty to represent the Debtor, that shareholders with objections to any acts of the Trustee could secure independent counsel to protect their interests, and that Mr. Claiborne's duty of representation extended only to the Debtor corporation and not to the individual shareholders. Also on September 15, 1989, Judge Dalis entered an Order striking from the record

"all pleadings (pleadings No. 69) filed by D. Landrum Harrison as representative for Landor Condominium Consultants, Inc." The basis for this Order was that "corporate entities cannot appear and plead matters 'pro se' and may only proceed through any attorney authorized to practice in this court . . . . As Mr. Harrison is not an attorney licensed to practice before this court he may not file pleadings and represent his employer in this proceeding."

In a third order dated September 15, 1989, Judge Daiis ruled on a procedural matter with respect to the objection to compromise filed by The Colony Place Company, Doris B. Harrison, Richard R. Bird, Annemarie S. Bird, James C. Harrison, III, and Marie W. Harrison. Judge Dalis found that the objection of The Colony Place Company was not signed

by an attorney representing the corporation as required by Bankruptcy Rule 9011 and said objection was stricken. With respect to Doris Harrison, Richard Bird and Annemarie Bird, Judge Dalis found that the objections were executed pro se and that they would be permitted to proceed with their objection. However, with respect to James C. Harrison, III, and Marie W. Harrison, he found that the objection was signed by D. Landrum Harrison as "attorney in fact". Judge Dalis ruled that James and Marie Harrison could appear pro se or through an attorney but could not utilize the services of an attorney in fact, finding that the preparation and filing of the pleading constituted acts of a legal character and thus could not be handled by a mere attorney in fact but would have to be handled by one authorized to practice

law. He ruled that the appearance by D. Landrum Harrison as attorney in fact "is nothing more than an attempt by this individual not licensed to practice before this court to appear and plead on behalf of another as if he were an attorney." Judge Dalis ruled that D. Landrum Harrison could not appear and plead on behalf of James and Marie Harrison but that they could proceed pro se or through a licensed attorney. Judge Dalis also pointed out that this pleading constituted the third attempt by D. Landrum Harrison to file pleadings and appear in this case in a representative capacity and stated:

> Any additional attempt by D. Landrum Harrison to file pleadings and appear on behalf of another entity in this or any related proceeding in this court can only be construed as an act calculated to hinder or obstruct this court in the administration of justice and

must be dealt with accordingly. See, 18 U.S.C. §401 and Bankruptcy Rule 9020.

The combined hearing on the Trustee's Application to Compromise the Controversy and on the Motion to Compel the Trustee to Abandon the Cause of Action against Bankers First was the subject of a lengthy hearing before Judge Dalis on September 18, 1989, in Augusta, Georgia. There were a number of appearances, including the pro se appearance of Doris B. Harrison and Richard R. Bird. However, there was no appearance at that hearing by or on behalf of Annemarie S. Bird, James C. Harrison, III, or Marie W. Harrison. Moreover, the was no appearance by or on behalf of Landor Condominium Consultants, Inc., the co-plaintiff with Mrs. Harrison in the Superior Court litigation against Bankers First. The evidentiary hearing

was lengthy and the exhibits introduced for consideration by the Court were, to say the least, voluminous. D. Landrum Harrison was called as a witness by Mrs. Harrison to testify in support of her objection to the Trustee's application. He testified at length and was subjected to cross examination, as were a number of other witnesses. At the conclusion of the hearing Judge Dalis took the matter under advisement.

On October 2, 1989, Judge Dalis addressed a letter to Doris Harrison and David Hudson, attorney for Bankers First, requesting each of them to submit proposed findings of fact and conclusions of law supporting their respective positions on the Trustee's application to compromise and setting a deadline of October 27th for the submission of such proposals. He forwarded a copy of his

letter to all other parties who had appeared on September 18th at the hearing affording them the same opportunity. (Exhibit P-1).

On October 27, 1989, two letters in reference to this matter were forwarded from the offices of Hull, Towill, Norman and Barrett. One was written by Mark S. Burgreen to D. Landrum Harrison, Doris Bird Harrison and Landor Condominium Consultants, Inc., and included a copy of the proposed order which the letter recited had been delivered to Judge Dalis on the same date (Exhibit P-3). The second letter written by Lawton Jordan, Jr., to Judge, Dalis reflected that the proposed findings of fact, conclusions of law, and order were transmitted to him by hand delivery. The letter went on to state the following:

> We are providing opposing parties with a copy of this proposed order.
>
> For your convenience, we are enclosing marked copies of the material referred to. Because the record in this case is so massive, this may be of assistance to you. We are also enclosing copies of the authorities cited in this draft. (Exhibit P-2)

In a subsequent paragraph of the letter, Mr. Jordan explains the manner in which references to the record of the trial are set forth in the proposed order. For example, he stated that references to the deposition of D. Landrum Harrison were made by simply using Mr. Harrison's initials, DLH, followed by the specific portion of the transcript where the testimony referred to appears (Exhibit P-2). Mr. Jordan's October 27th letter to Judge Dalis indicates service on certain parties but does not reveal that a copy was forwarded

to Mrs. Harrison, Mr. Harrison, or Landor. Doris Harrison filed her proposed findings of fact and conclusions of law on October 27, 1989. The document she filed in the court did not, however, indicate whether she had served opposing parties and by letter dated November 2, 1989, Judge Dalis addressed a letter to her requiring her to do so or to certify that she had previously done so by November 13, 1989 (Exhibit P-5). On November 6, 1989, Doris Harrison responded to Judge Dalis by stating that on November 6th she served her proposed order on Lawton Jordan and that she had served the Trustee, Mr. Walker, on October 31st.

On November 30, 1989, Judge Dalis signed an order granting the Trustee's Application to Approve the Compromise and denying "the motion of Doris B. Harrison

and Landor Condominium Consultants, Inc., to require the Trustee to abandon the claims against Bankers First."

On December 15, 1989, Doris B. Harrison filed a Motion to Amend Findings and Judgment. That motion was denied as not being timely filed pursuant to Bankruptcy Rule 7052 by order of Judge Dalis dated December 20, 1989. On December 22, 1989, Doris B. Harrison filed a motion for reconsideration of Judge Dalis' December 20th denial of her motion based upon a former version of Bankruptcy Rule 7052 which, if still effective, would have resulted in the original motion to alter or amend being timely filed. However, because of an amendment to Bankruptcy Rule 7052 effective August 1, 1989, the original motion of Doris B. Harrison to alter or amend was not, in fact, timely filed and

Judge Dalis so ruled by order dated December 27, 1989.

On February 8, 1990, Doris B. Harrison filed the Motion to Set Side Judgment which is the subject of this hearing, alleging that as a result of an intentional ex parte communication by attorneys for Bankers First with Judge Dalis in violation of Bankruptcy Rule 9003, the Court was "induced to err in the following particulars", setting forth thirty-one separate enumerations of error which are virtually the same if not identical to the grounds set forth in Doris Harrison's untimely motion to amend filed on December 15, 1989.

At the hearing held on February 28, 1990, before the undersigned, appearances were entered by David Hudson, Lawton Jordan and Mark Burgreen, attorneys for Bankers First, by Doris Harrison pro se,

by James D. Walker, Jr., the Trustee, and by D. Landrum Harrison. The status by which Mr. Harrison sought to appear at that hearing was initially unclear to the Court. Based on Judge Dalis' prior rulings that he could not appear on behalf of another party I sought clarification of his status whereupon Mr. Harrison exhibited an assignment of the claim of Landor Condominium Consultants, Inc., to D. Landrum Harrison in his individual capacity and an order of this court substituting him as a creditor in his individual capacity. I had serious reservations about the fortuitous timing of this assignment and the potential it carried that Judge Dalis' orders concerning Mr. Harrison's repeated attempts to involve himself in a representative capacity in this case were being circumvented. However, out of an

abundance of caution, and in order to insure that all parties with a colorable right to be heard were afforded that opportunity I permitted Mr. Harrison to appear in support of Mrs. Harrison's motion. I made no determination as to whether Landor's failure to appear at the September 18, 1989, hearing it and its assigns might lack standing to appear in this proceeding. Moreover, because there was no further objection to Mr. Harrison's appearance by any party in interest there was no inquiry in the bona fides of the assignment by virtue of which Mr. Harrison sought to appear and participate.

The evidence submitted at the hearing before me on February 28th was essentially uncontradicted, although the legal conclusions the parties seek to draw from that evidence are very much in

issue and very hotly disputed. Essentially three members of the firm of Hull, Towill, Norman and Barrett, collaborated on the proposed order submitted to Judge Dalis under cover letter dated October 27, 1989. It is uncontradicted that the letter from Lawton Jordan (Exhibit P-2) to Judge Dalis was not copied to Doris Harrison. It is also uncontradicted, however, that a copy of the proposed order forwarded to Judge Dalis by Mr. Jordan was timely sent to Mrs. Harrison as an attachment to the letter of Mark Burgreen (Exhibit P-3). It is further uncontradicted that certain attachments were enclosed in the package delivered to Judge Dalis along with Lawton Jordan's letter which were not included in the package sent to Mrs. Harrison.

From a reading of Mr. Jordan's October 27, 1989, letter it appears that the only attachments were copies of case law and excerpts of the record from the hearing relied upon by Bankers First in its proposed order. Indeed, the testimony of David Hudson and Lawton Jordan stands uncontradicted that, in fact, the only attachments to the letter and proposed order were those items. According to Hudson's testimony, in each instance where a portion of the transcript of the trial or a portion of a deposition introduced at trial was referred to in the finding of fact or conclusions of law submitted by Bankers First, a copy of the page or pages referred to in the proposed order was attached as a convenience to allow the Court to verify the accuracy of the proposed finding without having to dig through the voluminous record. Likewise,

the case authorities copied and attached to the proposed order were those cases cited in the proposed conclusions of law, again, as a convenience to the Court.

It is further uncontradicted that no material was supplied to Judge Dalis other than the record excerpts and copies of cases which were cited in the proposed order. It is further uncontradicted that all of the material cited in the proposed order, copies of which were provided to the Court, were accessible to Mrs. Harrison and all other parties in interest. This was true because the materials were excerpts from the record of the trial which were "available in the Clerk's Office" as set forth in Judge Dalis' October 27th letter (Exhibit P-1) and/or because they were already a part of the opposing party's individual files or because they were accessible in a law

library. It is also uncontradicted that there was no other communication, written or verbal, between any party in interest and Judge Dalis, with exception of the letters and attachments set forth above.

Neither Doris Harrison nor any party in interest learned of the contents of Lawton Jordan's letter to Judge Dalis of October 27, 1989, until after the deadline for filing a motion to alter or amend had run, sometime after December 15, 1989. This letter was apparently discovered during either Mrs. or Mr. Harrison's examination of the Court file at that time although Jordan's letter to Judge Dalis had been on file in the Clerk's Office since October 27, 1989. The record was unclear whether either the cases provided to Judge Dalis or the excerpts of the record may have been highlighted with yellow magic marker or

in some similar fashion. All the attorneys called for cross examination, Messrs. Jordan, Hudson and Burgreen, lacked independent recollection as to whether that had been done, but they did indicate that they would not be surprised if highlighting had occurred. The original transcript of the evidence from the September 18th hearing was filed in the Clerk's Office on October 27, 1989, and had not been opened as of the date of the hearing. However, during my consideration of this matter on March 2, 1990, I opened the envelope in which that transcript was contained for the purposes of reviewing same.

CONCLUSIONS OF LAW

Before the Court is a decision which touches some of the most fundamental concepts undergirding the integrity of the judicial system. They are the

concepts of equal access to justice, the requirement of procedural due process and the admonition that judicial processes must not only be fair but have the appearance of total fairness and impartiality. The motion to set aside judgment is based on Bankruptcy Rule 9003 which contains a general prohibition of ex parte contact between litigants and the Court and reads in relevant part:

> Except as otherwise permitted by applicable law, any party in interest and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

Bankruptcy Rule 9003 is closely related to a number of provisions in the Code of Conduct for Judicial Officers and the Code of Professional Responsibility governing attorneys' conduct. For

example the Code of Conduct for United States Judges, Canon 3(A)(4) provides in relevant part:

> A judge should accord to every person who is legally interested in a proceeding, or the person's lawyers, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding.

Canon 7 of the ABA Model Code of Professional Responsibility provides:

> A lawyer should represent a client zealously within the bounds of the law.

EC7-35 provided in relevant part:

> . . . Generally, in an adversary proceeding a lawyer should not communicate with the judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have

> the effect or gives the appearance of granting undue advantage to one party.

State Bar of Georgia Standard 60 provides in relevant part:

> In an adversary proceeding, a lawyer shall not initiate communication, or cause another to initiate communication, as to the merits of the cause with the judge or an official before whom the proceeding is pending . . .

with certain exceptions which are not relevant here.

In the context of these rules I hold that the issue presented for consideration involves a two-part inquiry. First, was there a prohibited ex parte communication from counsel to the Court? Second, if such a prohibited communication occurred what is the appropriate remedy?

It is clear from the above provisions that neither the Bankruptcy

Rule, the Code of Conduct for Judges, nor the State Bar Standards applicable to attorneys' conduct prohibit all communications between counsel and the Court. In each of the provisions there is language which makes it clear that the communication must be on the merits of the case, or have an affect on the outcome of the Court's decision, or must give the appearance of granting undue influence or advantage to one party over another.

The case most closely in point uncovered by this Court's research, and one which is relied upon by both of the parties to the dispute before me is the Eleventh Circuit decision In re Colony Square Company, 819 F.2d 272 (11th Cir. 1987). Although the decision is not factually on point in all respects, the case dealt with a "ghostwritten opinion"

which was solicited by the trial judge from the attorney for the prevailing side in a dispute which the judge had heard. When the ghostwritten opinion was solicited from the attorney, no notice to the adverse party was given. However, the court had already made a firm decision as to what its ruling would be and directed counsel to draft an order in a manner consistent with the court's theory of the case.

In Colony Square, the Eleventh Circuit was critical of the trial court's soliciting an opinion without notice to opposing counsel. The court was generally critical of the practice of trial courts permitting the litigants to draft opinions even when notice was given. Notwithstanding the Court's clear preference and belief that the better practice is for trial judges to draft

their own opinions and at the very least to solicit draft orders from parties only with notice to the other side, the court refused to set aside the trial court's judgment, finding that the complaining party had failed to show that the process by which the judge arrived at his decision was fundamentally unfair. Colony at 276; In re Dixie Broadcasting, Inc., 871 F.2d 1023 (11th Cir. 1989). Although not stated in these terms, the court emphasized the fact that the trial court in Colony Square had already reached a firm decision prior to soliciting the opinion to be drafted by prevailing counsel. Thus, I find implicit in its decision the recognition that an ex parte communication is not per se prohibited and does not per se require the reversal of a decision unless the communication is on the merits of the

case and affects the outcome. This, of course is consistent with my interpretation of the prohibition set forth in Bankruptcy Rule 9003.

In the case at bar, Court solicited proposed findings of fact and conclusions of law from both interested parties and notice of same was given. The question is whether Colony Square or other applicable authority would require the setting aside of a judgment when, in response to the Court's solicitation, one of the parties failed to serve the opposing side with all of the attachments that were sent to the court with its proposed order, when those attachments consisted only of excerpts from the record of the matter which the court itself had heard and copies of cases on which the proposed order relied, and when all the material was accessible to all

parties.

Having considered the evidence, argument of counsel and applicable authorities, I conclude that there was no prohibited ex parte communication in this case. Although counsel for Bankers First acknowledged, and I totally agree, that it would be better practice to have all attachments that were provided to the Court sent to opposing parties as well, I agree with the position of Bankers First that the act of providing the Court with courtesy copies of excerpts of the record of a proceeding that was tried before the judge to whom the proposed order has been submitted is not improper. The excerpts permitted to the Court to cross-reference the proposed order to the record without having to dig through hundreds of pages of documentary evidence and transcripts of testimony. When the attachments sent

to the Court contain no information whic is not specifically referenced in th order itself and when that order was dul served on opposing parties, there ha been no showing that a communicatio occurred between counsel and the cour which in the language of Rule 9003 affected the outcome of the case.

Bankers First's argument was full set forth in its order for all to see an the attachments did not amount to further communication. Although th excerpts which were provided to the judg addressed themselves, literally speaking to the merits, they were merel supportive of the argument on the merit which the moving party made within th confines of its proposed order. Th excerpts referenced in the order an attached to it for the Court's perusa were pieces of evidence and portions o

testimony which had been introduced in open Court in the presence of the opposing party and the documents and transcripts to which the order and the excerpts related were fully accessible at all times to the opposing party. Nothing extra was communicated to Judge Dalis in those attachments which was not disclosed in the proposed order to all parties. Thus I conclude that no prohibited ex parte communication occurred.

Alternatively, even if the communication is construed as the type of ex parte communication which is prohibited by Bankruptcy Rule 9003 and other applicable provisions, the Movant has failed to prove its entitlement to relief under Bankruptcy Rule 9024. As previously indicated, Colony Square establishes a rule that the moving party must show that the process was

"fundamentally unfair." Likewise, the remedy provided in Bankruptcy Rule 9024 which incorporates Federal Rule of Civil Procedure 60(b)(3) is an extraordinary remedy and is not an appropriate substitute for direct appeal. In re Design Classics, Inc., 788 F.2d 1384 (8th Cir. 1986); Tucker v. Commonwealth Land Title Ins. Co., 800 F.2d 1054 (11th Cir. 1986). The burden of showing the applicability of this section is on the Movant.

I find the Movant has failed to prove that such an extraordinary remedy should be afforded since the moving party has utterly failed to demonstrate any lack of due process or fundamental unfairness in the process. Therefore, even if the communication is construed as the type of ex parte communication which is prohibited by Bankruptcy Rule 9003 et

al, the Movant has failed to prove its entitlement to the relief under Bankruptcy Rule 9024. There was absolutely no evidence presented at the hearing or otherwise in the record which would support a conclusion that Judge Dalis' consideration of this additional material in any way affected him in reaching the conclusions and entering the judgment which he reached.

The fact that there is alleged to be evidence in the record that conflicts with some of Judge Dalis' findings is hardly surprising and not probative of any error on his part. In any contested matter, and certainly one as aggressively litigated as this one, there will be conflicting evidence. The judge's role is to enter rulings after weighing that conflicting evidence. Judge Dalis did so and decided the matter adversely to

Movants. In doing so he necessarily had to conclude that the preponderance of the evidence was on the side urged by the Trustee - not that there was no evidence to support Movant's position, merely that it was insufficient to overcome the Trustee's showing. Likewise, other allegations of error on Judge Dalis' part are unsupported in the record. Some of the alleged errors are purely technical in nature; others argue that the law was misapplied - however, none of the alleged error was shown to have been induced by the acts of opposing counsel which are in issue here. As Movant failed to introduce any evidence that the acts of opposing counsel induced the Court to err or to rule in a manner that was procedurally unfair, the Motion is denied on this alternative ground.

I feel further compelled to observe that Movant misapprehends the scope of the Trustee's duties in questions relating to the settlement of disputes and the role of the Court in approving or disapproving a proposed settlement.

9 Collier on Bankruptcy §9019.03 at 9019-4-5 (15th Ed. 1990) provides:

> [M]ost circuit courts that have considered the issue have adopted a uniform standard by which the bankruptcy judge or other trial officer should be governed in the hearing on a motion to approve a compromise. According to these cases, the court should consider:
>
> (a) The probability of success in the litigation;
>
> (b) the difficulties, if any, to be encountered in the matter of collection;
>
> (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it;
>
> (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

> . . . . The decision of the bankruptcy judge as to the approval or disapproval of a compromise agreement rests in the judge's sound discretion. Such a decision . . . will normally not be set aside except where there is an abuse of discretion.

See Protective Committee Stockholders of TMT Trailer Ferry, Inc., v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 202 L.Ed. 2d 425, (1968).

A trustee in reorganization has discretion to exercise business judgment in the operation of the debtor's business akin to the discretionary authority to exercise business judgment given to officers or directors of a corporation. In re Holiday Isles, Ltd., 29 B.R. 827 (Bankr. S.D. Fla. 1983). The bankruptcy judge's responsibility is not to decide numerous questions of law and fact raised by the parties in a settlement approval proceeding, but rather, to canvass the

issues and see whether the settlement falls below the lowest point in the range of reasonableness. In re Heissinger Resources, Ltd., 67 B.R. 378 (C.D. Ill. 1986). The Trustee has general discretionary authority to pursue a cause of action or, in its best judgment, to compromise, settle or abandon legal claims. In re American Energy, Inc. 49 B.R. 420 (Bankr. N.D. 1985). The court will not interfere with the Trustee's decision, where a business judgment is made in good faith, upon reasonable basis and within the Trustee's authority under the Bankruptcy Code. In re Curlew Valley Associates, 14 B.R. 506 (Bankr. D.Utah 1981). Inasmuch as I find that the Trustee's decision to compromise the Bankers First claim was within his authority under Bankruptcy Rule 9019 and was made after a good faith consideration

of many competing considerations it cannot be said that there was any abuse of discretion manifest in Judge Dalis' ruling. Thus, the Motion is denied on this third alternative ground.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Movant's Motion to Set Aside Judgment is denied.

/s/ Lamar W. Davis, Jr.
Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 4th day of April, 1990.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:
THE COLONY PLACE COMPANY, Debtor

DORIS B. HARRISON, Movant

vs.

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION AND JAMES D. WALKER, JR., TRUSTEE, Respondents

Chapter 7 Case
Number 88-10819

Date filed: February 21, 1990

ORDER

By motion filed February 8, 1990 and pursuant to Bankruptcy Rule 9024 [Federal Rule of Civil Procedure 60(b)] Doris B. Harrison, a party in interest in this Chapter 7 proceeding seeks to set aside the order of this court entered December 1, 1989 approving the application of James D. Walker, Jr., trustee, to compromise a controversy with Bankers First Federal Savings and Loan

Association and the corresponding denial of Ms. Harrison's motion to compel the trustee to abandon the estate's interest in the controversy resolved under the approved compromise. According to the motion, "an attorney for Bankers First Federal Savings and Loan Association intentionally communicated ex parte with the Court concerning this case in violation of Bankruptcy Rule 9003"; and "[b]y basing its judgment in whole or in part upon this unauthorized communication, the Court was induced to err . . ." Mrs. Harrison sets forth 31 alleged errors.

Bankruptcy Rule 9003 provides

> Except as otherwise permitted by applicable law, any party in interest and any attorney, accountant or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

The Code of Conduct for United States Judges Canon 3C(4) provides:

> A judge should accord to every person who is legally interested in a proceeding, or the person's lawyers, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding.

The motion alleges a violation of that provision by contending that I based my judgment in whole or in part upon an unauthorized communication, that is I considered an ex parte communication on the merits of the pending matter. The Code of Conduct for United States Judges Canon 3C(1) provides: "a judge shall disqualify himself . . . in a proceeding in which the judge's impartiality might reasonable be questioned . . ." In this motion to set aside judgment, I am asked to consider whether I violated the Code

of Conduct for United States Judges in issuing the order now brought into question. Clearly, my impartiality might reasonable be questioned.

It is therefore ORDERED that the clerk of this court shall transfer the motion to set aside judgment filed by Doris B. Harrison on February 8, 1990 in this proceeding to the Honorable Lamar W. Davis, Jr., Chief United States Bankruptcy Judge, Southern District of Georgia for further consideration. All other matters in this Chapter 7 proceeding shall remain before me pending final determination of the motion.

/s/ John S. Dalis
JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 21st day of February, 1990.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8173

IN RE: THE COLONY PLACE, Debtor.

DORIS B. HARRISON, Plaintiff-Appellant,

versus

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant-Appellee,.

JAMES D. WALKER, JR., Trustee.

On Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(March 1, 1993)

Before: HATCHETT and EDMONDSON, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on

the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), The Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8173

IN RE: THE COLONY PLACE COMPANY,
Debtor

DORIS B. HARRISON,
Plaintiff-Appellant,

versus

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION,
Defendant-Appellee,

JAMES D. WALKER, JR.,
Trustee.

On Appeal from the United States District Court for the Southern District of Georgia

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Date filed: April 13, 1992

O R D E R:

Appellant's motion to disqualify appellee's counsel, the law firm of HULL, TOWILL, NORMAN & BARRETT is denied.

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DORIS B.HARRISON,

Movant/Appellant

VS.

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION AND JAMES D. WALKER, JR., TRUSTEE

Appellees

APPEAL NO. 92-8173

APPELLANT'S MOTION TO DISQUALIFY OPPOSING COUNSEL

[Certificate of Interested Persons Omitted]

MOTION

Appellant, DORIS B. HARRISON, moves the Court for an order disqualifying the law firm of Hull, Towill, Norman and Barrett from arguing this appeal on behalf of appellee Bankers First Federal Savings and Loan Association and as grounds therefor shows the Court as follows:

1. This appeal is from the judgment of the District Court affirming the

judgment of the Bankruptcy Court denying appellant's motion to set aside a prior judgment of the Bankruptcy Court. The central issue involved in this appeal is whether misconduct on the part of members of the law firm of Hull, Towill, Norman and Barrett in obtaining the Bankruptcy Court judgment warrants the setting aside of that judgment. The misconduct complained of involves ex parte communications with the trial court.

2. The Bankruptcy Judge disqualified himself sua sponte at the first instance when this issue was raised in the trial court by Appellant's Rule 60 motion. At the evidentiary hearing before the substituted Bankruptcy Judge three members of the law firm of Hull, Towill, Norman and Barrett were called as witnesses and were twice and in open court afforded the opportunity and

declined to disqualify themselves and their law firm before presenting their own testimony regarding their misconduct. The transcript of that bench trial contains all of the evidence upon which this appeal is based and the three attorneys, namely, David E. Hudson, Lawton Jordan, Jr., and Mark S. Burgreen, were the only witnesses to testify at the hearing.

3. Appellant further shows the Court that it is contrary to well established precedent and inherently unfair to Appellant for the law firm, whose conduct is drawn into question and whose own testimony affords the evidentiary basis for a determination of this appeal, to be allowed to argue for appellee and thus be allowed to argue their and the firm's own credibility. The presumption of credibility which precedes an attorney's appearance before

this Court would afford the attorney an unfair advantage where that attorney's own credibility is in question.

4. "If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." Model Code of Professional Responsibility, EC 5-9 (1979), as quoted with approval in Dasher v. Stripling, 685

F.2d 385, 389 (11th Cir. 1982).

5. "[T]he courts have not only the supervisory power but also the duty and responsibility to disqualify counsel for unethical conduct prejudicial to his adversaries." Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975). "Moreover, in the disqualification situation, any doubt is to be resolved in favor of disqualification. Hull v. Celanese Corporation, 513 F.2d 568 (2d Cir. 1975). *See, also*, Healthcrest, Inc. v. American Medical International, Inc., 605 F.Supp. 1507 (N.D.Ga. 1985); Connell v. Clairol, Inc., 440 F.Supp. 17 (N.D.Ga. 1977); Sheldon Electric Co., Inc. v. Blackhawk Heating & Plumbing Co., Inc., 423 F.Supp. 486 (S.D.N.Y. 1976).

6. Attached hereto as Exhibits "A", "B" and "C", respectively, are true and

correct copies of the Bankruptcy Court's order disqualifying himself from hearing the Appellant's motion below, Appellant's letter of March 13, 1992, to the law firm in question requesting their voluntary disqualification in this appeal and the firm's response thereto dated March 20, 1992. Also attached hereto as Exhibit "D", are relevant pages from the transcript of the evidentiary hearing which is a part of the record in this appeal.

WHEREFORE, Appellant moves the Court to order that the law firm of Hull, Towill, Norman and Barrett be disqualified from representing and arguing the case of any appellee herein.

This 27th day of March, 1992.

/s/ Doris B. Harrison
DORIS B. HARRISON, Appellant Pro Se
1208 Colony Place Drive
Augusta, Georgia 30907
(404)860-4804

EXHIBIT "A"

[See Appendix page D-1 for Exhibit "A", Judge Dalis' order of recusal.]

EXHIBIT "B"

DORIS B. HARRISON
1208 Colony Place Drive
Augusta, Georgia 30907

March 13, 1992

Mr. Lawton Jordan, Jr.
Hull, Towill, Norman & Barrett
P. O. Box 1564
Augusta, GA 30913

CERTIFIED MAIL RETURN RECEIPT REQUESTED

RE: Harrison v. Bankers First Federal
11th Cir. U. S. Court of Appeals
No. 92-8173 Docketed March 9, 1992

Dear Mr. Jordan:

At a meeting in your conference room two weeks ago, you were told that I expected you and your law firm to engage other counsel to brief and argue the above-captioned appeal. The purpose of this letter is to formally request your

voluntary disqualification.

As you know, the central issue in this appeal is whether you and other members of your firm engaged in improper conduct that warrants the setting aside of the Bankruptcy Court's judgment approving the agreement between Bankers First and the Trustee in Bankruptcy. I consider it inappropriate for a law firm to represent itself under the guise of representing a client and I believe the Court of Appeals will agree with me.

If you decline my request or fail to reply by March 20, 1992, I will file a motion in the U. S. Court of Appeals for the 11th Circuit seeking an order for your disqualification.

Sincerely,

/s/ Doris B. Harrison
Appellant Pro Se

cc: W. Hale Barrett
David E. Hudson
Mark S. Burgreen
James D. Walker, Jr.
Jack Berry

EXHIBIT "C"

LAW OFFICES
HULL, TOWILL, NORMAN & BARRETT
A PROFESSIONAL CORPORATION
P. O. BOX 1564
AUGUSTA, GEORGIA 30913

[List of lawyers and office address omitted]

March 20, 1992

Ms. Doris B. Harrison
1208 Colony Place Drive
Augusta, GA 30907

RE: Harrison v. Bankers First Federal Savings & Loan Association
11th Cir. U. S. Court of Appeals
No. 92-8173

Dear Ms. Harrison:

In connection with your letter of March 13, 1992, your suggestion that this law firm is engaged in improper conduct by representing Bankers First in the

above style matter is denied.

Your very truly,

/s/Lawton Jordan, Jr.

LJ,JR:pgd

A:\DBH.DIS

EXHIBIT "D"

[Exhibit "D" omitted. See Appendix Page J-1 for relevant portion of transcript.]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE: THE COLONY PLACE COMPANY,
Debtor

JAMES D. WALKER, JR., TRUSTEE,
Movant

Chapter 7 Case
Number 88-10819

Date filed: November 30, 1989

MEMORANDUM AND ORDER ON APPLICATION OF THE TRUSTEE TO COMPROMISE CONTROVERSY AND MOTION TO REQUIRE TRUSTEE TO ABANDON PROPERTY

A hearing was held on September 18, 1989 on the Trustee's application to compromise all claims against Bankers First Federal Savings and Loan Association ("Bankers First") and on the motion of two principals of The Colony Place Company, the debtor, D. Landrum Harrison ("Harrison"), its president, and his wife, Doris Harrison, its secretary and a 20% shareholder, to require the Trustee to abandon all claims against

Bankers First, its employees and agents in order for Mrs. Harrison to continue an action against Bankers First now pending in the Superior Court of Richmond County, Georgia. The debtor attempted to develop a condominium project and the Harrisons claim that Bankers First, which provided financing, is responsible for the failure of the project.

A. FINDINGS OF FACT

In 1984, the debtor applied to Bankers First for loans to acquire and develop a 9.55 acre tract of land in Richmond County, Georgia, and construct a 120 unit condominium project ("Colony Place"). Landor Condominium Consultants, Inc. ("Landor"), a company owned by the Harrisons was the project manager. The debtor requested, and Bankers First agreed to loan, $700,000.00, to acquire and develop the property (Trustee's

Exhibit 3 & 6). The debtor projected that construction loans of $1,000,000.00 would be required to build the 120 condominium units which would be completed and sold by May of 1987 (Deposition of D. Landrum Harrison Vol. I page 49 hereafter DLH I - 49).

The development did not proceed as projected and cost overruns were experienced. In August of 1985, Bankers First loaned the debtor $65,000.00 to cover the first set of cost overruns (Trustee's Exhibit 10; DLH III - 35). In June of 1986, Bankers First loaned debtor an additional $200,000.00 to cover more cost overruns. (DLH III - 79) Cost overruns were also experienced after construction began and Bankers First loaned the debtor additional funds.

There were also time delays. The debtor had projected that 24 units would be completed and sold by January of 1986, but at that time, there had been no sales (Trustee's Exhibit 10). By August of 1987, only 22 units had been sold (Exhibit P-2, Page 15 of 10/17/88 transcript). On October 30, 1987, Bankers First agreed to loan debtor up to $808,000.00 in additional funds to complete the project (9/18/89 Transcript, pp. 87 & 103-104). However, only five units sold between October of 1987 and May of 1988 (Exhibit P-2, Page 15 of 10/17/88 Transcript). Interest was not paid and Bankers First declared the loans in default and initiated foreclosure (Trustee's Exhibit 51 and 9/18/89 Transcript, p. 117). Harrison, as President of The Colony Place Condominium Association, Inc., filed a one-petitioner involuntary bankruptcy petition against

the debtor to stop the foreclosures. At that time, Harrison was also President of the debtor, and his wife, Doris, was Secretary of the debtor. At a hearing before this court on August 30, 1988, debtor was placed in Chapter 7. At this hearing, Harrison argued that his July 5, 1988, involuntary petition was invalid because there was only one petitioner and three petitioners were required since the debtor had more than twelve creditors (8/30/88 Transcript, pp. 2-3).

After an extensive investigation of Harrison's allegations against Bankers First, the Trustee negotiated a settlement. In support of the settlement, the Trustee has introduced the depositions, with exhibits, taken as part of his investigation plus additional evidence, and the testimony of several

witnesses. Notice of this hearing was given to all creditors.

Attorneys for David Roper and Harold Fowler, two principals and unsecured creditors of the debtor argued in support of the settlement, and two other unsecured creditors filed briefs in support of the settlement. The Harrisons, and one unsecured creditor, objected to the settlement. None of the approximately 50 other creditors objected to the proposed settlement. The allegations of the Harrisons are discussed below.

1. Joint Venture or Partnership. There is no evidence that Bankers First and the debtor agreed to share profits or losses or intended to enter into a partnership as alleged by the Harrisons. On the contrary, it appears from the

voluminous loan documentation that the relationship between the parties was that of borrower and lender. Also, on September 10, 1986, the debtor signed an acknowledgment that no joint venture or partnership existed between the debtor and Bankers First (Trustee's Exhibit T-155). There was an agreement that the debtor would pay Bankers First up to 3% of the gross proceeds of each condominium sale (9/18/89 Transcript, p. 61), but this agreement was based on gross proceeds and was not a participation in profits and in fact, was never implemented (9/18/89 Transcript pp. 81-82).

2. Risky Loan. The Harrisons contend that Bankers First is liable because debtor was inexperienced, with no capital, and Bankers First agreed to loan

the debtor whatever money was needed to complete the project. Harrison testified that the principals were "astounded" that Bankers First was interested in making the loan (DLH I - 21) and that the debtor did not refuse to accept the loan because it did not want "to look a gift horse in the mouth" (DLH I -35).

Debtor submitted the following information as part of its initial loan application to Bankers First about the experience of its principals and Landor:

> HAROLD H. FOWLER, President and Chairman . . . moved to Augusta upon his retirement from Century Bank (now Sun Bank) where he had served as Vice President . . . He . . . holds the Bachelor of Arts Degree from Temple. . . has been active in condominium management and is licensed as a Real Estate Salesperson. . .
>
> RICHARD R. BIRD, Vice President and Director . . . has been active in real estate sales and construction, having managed

his own residential construction company . . . is . . . employed full-time as a licensed Real Estate Salesperson, concentrating in residential condominium and townhome sales.

DORIS B. HARRISON, is Secretary, Treasurer and Director of The Colony Place Company, She is also a principal in Landor, which is the project manager for Colony Place.

J. DAVID ROPER . . . has been engaged in the practice of law, concentrating in real estate matters, for the past 12 years. Holds both the Bachelor of Arts and Juris Doctor degrees from the University of Georgia.

LANDOR CONDOMINIUM CONSULTANTS, INC., specializes in condominium. . .and other projects providing a full range of services from research and planning through development and management. LANDOR is licensed as Broker by the Georgia Real Estate Commission. Its resources include extensive data and reference materials on the state-of-the-art in condominiums and homeowners associations. Marketing activities . . . employ four licensed salespersons specially trained in condominium and townhome sales.

> D. LANDRUM HARRISON is President of LANDOR . . . An attorney and former banker, Mr. Harrison holds Bachelor of Arts (Economics) and Juris Doctor degrees from Harvard College and the University of Georgia School of Law. . . His combined experience in trust and commercial banking and the general practice of law spans twenty-five years and include extensive experience in real estate financing, development, management and documentation. He is licensed as a Real Estate Broker.
>
> DORIS B. HARRISON is Vice President and director of community services for LANDOR and director of sales for LANDOR PROPERTIES. Mrs. Harrison owned and operated a retail home furnishings outlet before joining LANDOR. . . She has had extensive experience in sales and . . . in condominium management. She is licensed as a Real Estate Salesperson. (Trustee's Exhibit 2, pp. 15-18)

It is clear the principals of the debtor and the management company (Landor) represented to Bankers First that they had extensive experience in banking, building, condominiums, law,

marketing and real estate. No evidence has been introduced to indicate that the information furnished to Bankers First was incorrect.

Harrison has testified that principals of the debtor made capital contributions of $36,500 and loans of $104,117 to the debtor (DLH III - 84). The principals made substantial financial commitments to the Colony Place project and were not without funds.

The claim that Bankers First agreed to provide whatever money was needed is not supported by the facts. The loan documentation clearly establishes that Bankers First only agreed to loan specific sums. Also, in a 1985 cash flow forecast, the debtor said: "Any substantial cost overruns will have to be borne by the developer from other than

construction draws" (Trustee's Exhibit 7, p. 7).

3. Draw Procedure. The Harrisons allege that Bankers First should have funded the loan on a cash flow basis instead of a percentage of completion basis. In connection with the draw procedure, Harrison testified that ". . . I did my best to teach them [Bankers First] what I had assumed they knew in the very beginning . . ." (DLH II -211). Harrison admitted that Bankers First did not agree to use the cash flow method and that the debtor accepted the loan with draws based on percentage of completion (DLH I - 49, 58). He also admitted that Bankers First changed the draw procedure within two months to accommodate debtor (9/18/89 Transcript, pp. 60-61). Moreover, Harrison testified that the

method used would have been satisfactory if the debtor had met its projections. (DLH III - 56, 60, 63).

Thomas Tucker, an attorney and expert witness on legal matters relating to construction and financing litigation appearing as a witness on behalf of the trustee, testified as follows:

> ". . . the cash flow method. . .would have given Bankers First no control over the money. It would have been like pouring it into a bottomless pit. The method that was utilized, the draw procedure, was agreed to by Colony Place. . . at one time it was even modified by Bankers First to accommodate Colony Place. I don't. . .see how you can challenge someone's method of funding money to you if you agree to the method. If [Harrison] didn't like it, he shouldn't have taken the money. . ." (9/18/89 Transcript, p. 27)

Bankers First met the agreed upon construction advance method of financing

the project.

4. Draw Requests. The Harrisons contend that Bankers First did not fund draw requests promptly. The draw requests were introduced into evidence (T-170). Mr. Tucker testified on this issue as follows:

> ". . .I reviewed forty-eight of those draw requests. And the forty-seven of the forty-eight were responded to by Bankers First within ten days, and I believe that the loan documents gave them, as I recall, at least that much time. These were responded to, often, when the borrower was in default and did not even have to be responded to by Bankers First. Forty of the forty-eight. . . were responded to within five days. So I don't believe that there's any factual basis for an allegation that the draw requests were not properly responded to. And, in fact, the evidence is directly contrary to such an allegation. . . " (9/18/89 Transcript, pp. 28 & 29)

Bankers First properly responded to the draw requests.

5. Permanent Loan Applications. The Harrisons contend that the project lost sales because Bankers First mishandled the loan applications of buyers. Doris Harrison testified that she thought three or four buyers were lost, but she could not remember the dates or names and had no specific information about the potential buyer. (Doris Harrison - 10-14). Accepting Mrs. Harrison's contentions as fact, three or four additional sales would have made, at best, an insignificant difference in the success of the project given the magnitude of the losses and the many problems encountered. This allegation is without merit.

6. Exercise of Option. The Harrisons contend that Bankers First improperly exercised a real estate option assigned to the bank as collateral for the loans. Bankers First was authorized to exercise the option if the option was to expire in less than thirty days (Trustee's Exhibit 35). The option property had a value substantially in excess of the $270,000.00 exercise price and Harrison admitted the debtor did not have the funds to exercise the option (9/18/89 Transcript, pp. 67-68). Bankers First advised the debtor it was exercising the option and that the property acquired was held for the benefit of the debtor (Trustee's Exhibit 35). Moreover, Bankers First then sold the option property to the debtor for $270,000 (9/18/89 Transcript pp. 102-103). Bankers First did not

improperly exercise the option.

7. Superior Court Litigation. The Harrisons have attempted to file a $20,000,000 verified complaint in the Superior Court of Richmond County, Georgia on behalf of debtor alleging that Bankers First improperly foreclosed on the debtor's property and making numerous other allegations against Bankers First. The Harrisons have not offered any evidence to support those allegations. The Court does take note of one of these allegations. The verified complaint alleges that Bankers First violated the automatic stay by foreclosing on property of the debtor (Complaint, p. 7), but this allegation is incorrect. At a hearing on October 17, 1988, this Court orally granted Bankers First permission to foreclose and subsequently entered a

written order to that effect (Order of October 21, 1988).

8. Other Allegations. The Harrisons make other allegations against Bankers First. Basically, they argue that all or most of the project's problems were caused by Bankers First and that Bankers First agreed to loan whatever amount was needed to complete the project. Many of these allegations are general in nature and are inconsistent with the findings of fact set forth elsewhere in this decision. The contention that Bankers First agreed to loan the debtor whatever sum of money was necessary to complete the project is without merit.

9. Releases. On two occasions, March 17, 1987 and October 30, 1987, the debtor signed releases releasing Bankers

First from all liabilities in connection with the Colony Place Company loans (Exhibits T-170 and T-190). Harrison admitted that he was not physically forced to sign the releases, that he was a graduate of Harvard College and the University of Georgia Law School, that he could read, that he knew he was signing a release and that the releases were supported by consideration (9/18/89 Transcript, pp. 76-77, 86).

10. Conduct of Debtor. There is substantial evidence, based on the testimony of Harrison, that The Colony Place project failed for reasons having nothing to do with Bankers First. The following excerpts from Harrison's letters and depositions describe these problems and the responsibility for them:

. . . We have not been successful in estimating costs with sufficient accuracy. For example, the Clubhouse was to have cost $60,000. This estimate was later raised to $79,000, but the actual cost has turned out to be closer to $100,000. . . The cost of the residential buildings is another matter. . . . What started out to be a $300,000 building and then became a $334,000 building is now looking like a $350,000 building some cost items still not pinned down. . . things have not only cost more than we anticipated but have taken longer to accomplish.

. . . During the winter of 1984 and 1985, probably the wettest winter we have ever had. . . So everything proceeded slowly throughout that winter and spring. We were able to basically finish those items covered by the original A and D Loan, which would have been the site work plus the construction of the clubhouse and the landscaping in connection with that. I had figured we would finish that in April. We finished it in October. So, yes, time was a problem all the way through. . . (DLH III - 34-35).

Q. What kind of cost overruns did you have on the clubhouse?

A. All right. We show the final cost of the clubhouse construction to have been $97,290.75.
Q. And what was the original projection?
A. $60,000
(DLH III -35)

. . .we had to replace Mr. Bird as construction superintendent. . . Construction was dragging. We were getting into this problem with respect to the money flow. The only real hope from our point of view in dealing with any of the problems we had independently at Bankers First was to realize the net proceeds out of the sale of the units. That meant construction had to pick up and move forward to reach that point before everything went down the drain because we couldn't pay a lot of bills. . .(DLH I - 98)

. . .We are now talking about basically November and December of 1985. At this point, we are under full construction with respect to the first building. We are trying to get the slab in for the second building. Everything is proving to cost more and take longer than we had anticipated. (DLH III - 38)

. . .As it, of course, turned out, the amount of money was greater that was required, the price of units went up

substantially over what was suggested in the proposal, the length of time to build turned out to be far longer than we had anticipated, and the absorption rate turned out to be far lower than we had anticipated. But these were projections made at that time based on our best estimate of what would happen. . . (DLH III -12)

Mr. Walker: And the units weren't ready to sell as fast as that proposal suggested that they would be ready to sell?

Harrison: That is correct.

Mr. Walker: But they didn't sell even after they were available as quickly as they were projected to sell after they became available; is that correct?

Harrison: That's correct.
(DLH III - 67)

Mr. Walker: What I see is that, regardless of any structuring problem, there is a deep and powerful obstacle that presented itself that no one anticipated, and that is slow sales. Is that a correct conclusion?

Harrison: Slow sales and slow construction.
(DLH III - 68)

> . . .In the spring of 1987, the whole country experienced a depression in the real estate market which was discovered in June, and nobody has an answer yet, I don't think, as to why that happened. Naturally that affected us. . .
> (Doris Harrison - 18)

> . . .As you are no doubt aware, the real estate market in the Augusta area has taken a plunge over the past few months. This has hit us very hard at Colony Place. . .(Trustee's Exhibit 31; 7/22/87 letter signed by Harrison)

> . . .we have to do three things: (1) Exercise our option on the property before we lose everything the Front Six has to offer; (2) pay on the interest due Bankers First before it is left with no choice but to foreclose, and (3) make some effort towards satisfying our trade creditors. . . (Trustee's Exhibit 32, Page 3; 8/17/87 letter signed by Harrison; emphasis added)

> . . .knowing that if we come up short again, we will lose everything. . .(Trustee's Exhibit 36, Page 1; 10/6/87 letter signed by Harrison to Bankers First.)

Harrison admitted that the debtor would not have had cash flow problems and

would have been able to complete the project if its own projections had been met (DLH III - 56, 60 & 63). Bankers First not only fulfilled its obligations under the agreements with debtor, but made additional loans which are discussed below. Many of the debtor's problems were due to bad weather and poor market conditions. Others were due to management problems in the construction, cost control and planning areas. All these factors were beyond the control of Bankers First.

11. Additional Loan and Losses by Bankers First. Bankers First repeatedly loaned the debtor additional funds to complete the development. By October, 1988, Bankers First had loaned the debtor $2,300,000 instead of the $1,700,000 debtor had projected would be needed to

build and sell 120 units (Trustee's Exhibit 6, Page 1). Only 25 units had been sold and only 48 units were built or partially built by October of 1988 (Exhibit P-3, and Exhibit P-2, pp. 9, 10, 15 of 10/17/88 Transcript). Thus, Bankers First loaned the debtor 35% more than it originally agreed to, and with this money, debtor constructed, or partially constructed, only 40% of the units (48 of 120) it had projected and sold less than 21% (25 of 120) of the projected units. Edmond M. Smith, a Vice President of Bankers First, testified that the bank has suffered significant losses as a result of the loans to debtor (9/18/89 Transcript, p. 107).

12. Funds for Representation. Neither the debtor nor the Harrisons have the funds to employ lawyers to pursue their allegations. No attorney has

agreed to take the case against Bankers First on a contingent fee basis (9/18/89 Transcript p. 83).

14. Thomas M. Tucker. Thomas M. Tucker, an attorney who was retained as an expert witness testified in support of the trustee's motion, and concluded that the many allegations of the Harrisons were not supported by the law or the facts and that the releases were binding and prohibited the debtor from asserting the claims the Harrisons seek to assert (9/18/89 Transcript, p. 28). Tucker concluded that the case against Bankers First was without merit (9/18/89 Transcript p. 30).

15. Proposed Settlement. The Trustee proposes to settle all claims against Bankers First by obtaining an

option from Bankers First to purchase a 2.74 acre tract and a 3.06 acre tract formerly owned by debtor and obtained by Bankers First when it foreclosed. (This is the same property Bankers First exercised the option to purchase on 9/21/87). The option price is about $123,000 an acre during the first year of the option and about $138,000 an acre during the second year.

If the option is not exercised, Bankers First will pay the Trustee $25,000. Bankers First has also agreed to subordinate its unsecured claim of approximately $514,000 to the claims of the other unsecured creditors. The Harrisons allege that Bankers First has no unsecured claims. However, petitions for confirmation of the foreclosure sales have been filed (Trustee's Exhibits T-50 and T-60). Under these circumstances,

the agreement by Bankers First to subordinate its unsecured claim which is approximately 70% of the total unsecured claims, is of significant benefit to the remaining unsecured creditors.

Mike Graybill, a realtor, testified that the 3.06 acre tract was located in the I-20/Washington Road corridor and had many desirable features including location, access, visibility and utilities, and was in close proximity to national motel chains. Mr. Graybill also testified that two national motel chains have identified the 3.06 acre tract as their first choice for a motel, and he felt very strongly that the 3.06 tract could be sold within the two-year option period for a price within 10% of $200,000 an acre.

The Harrisons claim the option is of no value. However, in October of 1988, Harrison gave the Trustee a document (Exhibit T-120) valuing the option property at $170,000 an acre. Doris Harrison filed schedules in this case valuing the property at $200,000 per acre (Schedules, Unimproved Land Inventory). Based on this evidence, I find that the option has value for the benefit of the estate.

16. Trustee. The Trustee testified that he concluded from his extensive investigation that there was no valid cause of action against Bankers First, and he felt the settlement was in the best interest of the estate (9/18/89 Transcript, pp. 135 -137).

B. CONCLUSIONS OF LAW

1. No Partnership or Joint Venture. The Harrisons claim that a joint venture or partnership existed between Bankers First and the debtor. Generally, a partnership is a voluntary agreement between two or more persons to contribute their money, property, or skill to the operation of a joint business or common enterprise for their common benefits and to divide the profits and bear the losses in certain proportions. Hayes v. Irwin, 541 F. Supp. 397, 415 (N.D. Ga. 1982), aff'd., 729 F. 2d 1466 (11th Cir. 1984), cert. denied, 469 U.S. 857, 105 S. Ct. 185, 83 L.E. 2d 119 (1984). A partnership need not be in writing, for the true determinant of a partnership is the objective intent of the parties involved. Hayes v. Irwin, supra.

The relationship between Bankers First and debtor was that of lender and

borrower, and no partnership or joint venture existed between these parties.

2. Bankers First Not Liable for Making Loan. Even if the facts supported the Harrisons' allegations of inexperience and no capital, which they do not, Bankers First would not be liable for making the loan. Many loans, especially real estate construction loans, involve risk. The fact that a lender agrees to make a risky loan does not make it liable to the borrower if the borrower cannot repay the loan.

> Borrowers have occasionally argued that a bank owed a duty to not loan money for risky ventures when the bank knew or should have known that the venture might result in a loss to the Borrower. No reported appellate opinion has approved such a cause of action. Lender Liability: Theory & Practice, Bucknell, Goodwin & Stoddard; Professional Educational System, Inc. (1988)

In Wagner v. Benson, 101 Cal. App. 3d 27, 35, 161 Cal. Rptr. 516, 521 (1980), the Court said:

> As to the negligence claim, the Wagners allege that they have suffered substantial foreseeable harm from the bank's negligence in loaning money to them, as inexperienced investors, through a risky venture over which the bank exercised influence and control. However, the bank owes no duty of care to the Wagners in approving their loan.

Further, the court states:

> Public policy does not impose upon the bank absolute liability for the hardships which may befall the business venture it finances. 101 Cal. App. 3d at 34, 161 Cal. Rptr. at 520.

In Pardue v. Bankers First Federal Savings & Loan Association, 175 Ga. App. 814, 334 S.E.2d 926 (1985), the Court said:

> There is, moreover, particularly no confidential relationship between lender and borrower or mortgagor for they are creditor and debtor with clearly opposite interests.

There was not a confidential or fiduciary relationship between Bankers First and debtor, and Bankers First had no duty to refuse to make the loan and is not liable to debtor for making the loan.

3. Validity of Releases. A release is a contract and voidable only if obtained by duress. O.C.G.A. §13-5-6. In Chouinard v. Chouinard, 568 F.2d 430 (5th Cir. 1978), the Court discussed the Georgia law of duress and said:

> A contract is voidable where undue and unjust advantage has been taken of a person's economic necessity or distress to coerce him into making the agreement. However, a duress claim of this nature must be based on the acts or consideration of the opposite party and not merely on the necessities of the proposed victim. Thus, the mere fact

> that a person enters into a contract as a result of the pressure of business circumstances, financial embarrassment, or economic necessity is not sufficient.

The facts stated above show that the releases were supported by consideration, that Harrison read and understood them and was not physically forced or threatened to sign them. There is no evidence of duress by Bankers First. The releases are valid and binding on debtor.

4. Proposed Settlement. The standards that this court should follow in considering a proposed compromise are stated by the Supreme Court of the United States in TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S. Ct. 1157 20 L.Ed2d 1, (1968):

> . . . There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised

himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. . .

TMT Trailer Ferry, 20 L.Ed.2d at 9-10.

. . .A bankruptcy judge may approve a settlement in a liquidation proceeding if the settlement is in the estate's best interests. . . Central to the bankruptcy judge's determination is a comparison of the settlement's terms with the litigation's probable costs and probable benefits. Among the factors the bankruptcy judge should consider in his analysis are the litigation's complexity, and the litigation's attendant expense, inconvenience, and delay. . .The bankruptcy judge should also consider the creditor's objections to the settlement; however, the creditor's views are not controlling. . .

In re: American Reserve Corp., 841 F.2d 159, 161 (7th Cir. 1987). See also In re: Jackson Brewing Company, 624 F.2d 605 (5th Cir. 1980), and Collier on Bankruptcy, 9019.03, (L. King, 15th Ed., 1989).

a. Probability of Success of Superior Court Shareholder Derivative Action.

(i) The numerous allegations of the Harrisons are not supported in any material respects by the facts.

(ii) The allegations are not supported by the law.

(iii) Recovery is sought for a project failure caused by some factors beyond the debtor's control and other factors such as construction problems,

cost overruns, and materially inaccurate projections for which debtor must be held responsible.

(iv) Bankers First repeatedly funded cost overruns which it had no obligation to do and has incurred substantial losses in its loans to debtor.

(v) The debtor has released Bankers First from liability on two occasions.

(vi) Expert legal testimony concluded that the claims of debtor against Bankers First are lacking in merit.

(b) Best Interest of Estate. Because of the extremely low probability of success in litigation, the best interest of the estate is served by

accepting the compromise which assures the estate of $25,000 and the realistic possibility of substantially more if the potential of the option property is realized. Only the Harrisons, Landor and one other creditor have objected to the settlement. I find the proposed settlement is in the best interest of the estate and the settlement is approved.

This decision constitutes the Court's findings of fact and conclusions of law as provided in Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052. An order will be entered in accordance with the decision.

ORDER APPROVING COMPROMISE

The Trustee has asked the Court to approve the proposed compromise between the Trustee and bankers First as outlined in the application of the Trustee and the

agreement between the Trustee and Bankers First, a copy of which is attached hereto as Exhibit "A".

A hearing on the Trustee's motion was held on September 18, 1989, and on the motion to require the Trustee to abandon all claims against Bankers First, its employees and agents. Notice of the hearing was given to all creditors. In addition to the Trustee, the compromise was supported by Bankers First, two principals of the debtor who are also unsecured creditors of the debtor, and two other unsecured creditors. The only objections to the compromise were by two principals of the debtor and an unsecured creditor of the debtor. The record consisted of previous documents and pleadings filed in the Chapter 7 case, the depositions and exhibits filed by the

Trustee, the testimony of witnesses at the hearing and documentary evidence introduced at the hearing.

Incorporated within this order by reference is the preceding findings of fact and conclusions of law as provided in Rule 52, Federal Rules of Civil Procedure and bankruptcy Rule 7052.

It is therefore ORDERED that the Trustee's application to approve the compromise is hereby GRANTED and the Trustee and Bankers First are authorized to execute such documents as appropriate to consummate the compromise agreement between Bankers First and the Trustee.

It is further ORDERED that the motion of Doris B. Harrison and Landor Condominium Consultants, Inc. to require Trustee to abandon the claims against

Bankers First is hereby DENIED.

/s/ John S. Dalis
JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 30th day of November, 1989.

BANKERS FIRST

Bankers First Federal
Savings and Loan Association

Mailing Address
Post Office Box 1332
Augusta, Georgia 30913-2999

Main Office
985 Broad Street
Augusta, Georgia 30901
Telephone 404 823-3200

September 15, 1989

Mr. James D. Walker, Jr.
Surrett, Walker, Creson & Colley
8th Floor Trust Company Bank
Augusta, GA 30901

RE: The Colony Place Company

Dear Mr. Walker:

The purpose of this letter is to restate and revise the agreement dated January 4, 1989 between you as the Trustee of The Colony Place Company and Bankers First Federal Savings and Loan Association with the understanding that this agreement is subject to approval by the U.S. Bankruptcy Court for the

Southern District of Georgia.

The revised agreement is as follows: GRANTING OF OPTION, Bankers First will: Grant you an option to purchase the "front six" at Colony Place. This property consists of two tracts containing 3.06 acres and 2.74 acres ("Option Property").

TIME FOR EXERCISE: The option will extend for a two year period from the date of the entry of an Order by the United States Bankruptcy Court for the Southern District of Georgia approving this agreement.

OPTION PRICE: The purchase price will be $712,500.00 if the option is exercised during the first year and $787,500.00 if exercised during the second year.

METHOD OF EXERCISE; CLOSING: The option may be exercised by written notice to Bankers First. Real estate taxes will be prorated as of the tender date. Bankers First will convey the Option Property by limited warranty deed and shall be responsible for payment of transfer tax on the deed. The trustee will be responsible for recording costs.

PARTIAL EXERCISE OF OPTION: The Trustee may exercise the option in part for either the 3.06 acre tract or the 2.74 acre tract. In the event of a partial exercise, the option price shall be $376,200 for the 3.06 acre tract during the first year and $415,500 for said tract during the second year. The price for the 2.74 acre tract shall be $336,300 for said tract during the first year and $372,000 for said tract during the second

year. A partial exercise of the option shall not prohibit the Trustee from subsequently exercising the balance of the option.

BUFFER ZONE: Bankers First shall have the right to establish a buffer zone on the rear portion of the Option Property which in the reasonable judgment of Bankers First provides an appropriate buffer between the Colony Place Condominium units and the developed portion of the Option Property so as to provide visual and sound separation between the Colony Place Condominiums and the Option Property. Such buffer zone may be a wall, fence, trees, bushes, some combination of these or other buffers acceptable to Bankers First. Said buffer zone shall be no more than 15 feet in width and shall be maintained by Bankers

First or its assignee. Prior to the closing of the sale of any portion of the Option Property, Bankers First shall designate said buffer zone, if it elects to establish one, and title to the land comprising said buffer zone shall remain in Bankers First and be excluded from the real property to be conveyed pursuant to the Option.

RELOCATION OF ROAD: If a proposed exercise of the option involves a relocation of the road separating the two tracts which comprise the Option Property, Bankers First must approve the plan to relocate said road. Such approval shall not be unreasonably withheld.

OPTION NOT EXERCISED: If the Trustee does not exercise or partially exercise this option before the expiration date

or, if the Trustee advises Bankers First he is waiving his right to exercise the option Bankers First shall, within ten days after said expiration date, or receipt of said notice, as the case may be, pay the Trustee $25,000.

SUBORDINATION BY BANKERS FIRST: Bankers First will subordinate its unsecured claim against The Colony Place Company (approximately $500,000) to the claims of all other unsubordinated, unsecured creditors.

RELEASE OF BANKERS FIRST BY TRUSTEE: The Trustee will give Bankers First and affiliated companies and their employees and agents a release from The Colony Place Company of claims of every kind whatsoever the The Colony Place Company could have asserted against Bankers First

and affiliated companies and their employees and agents, including but not limited to, all claims arising out of transactions in connection with loans to, and all dealings in connection with The Colony Place Company. Said release will include a release by The Colony Place Company of Bankers First and affiliated companies and their employees and agents of any claim that The Colony Place Company might have arising from the existence of a joint venture, partnership or any other relationship between the parties, including, but not limited to, the release, waiver and surrender of any claim that any security instrument given by The Colony Place Company to Bankers First should be subordinated is void, voidable or subject to being set aside for any reason whatsoever.

Said Release will also include a Release by The Colony Place Company of any interest in the real property formerly owned by The Colony Place Company that Bankers First purchased at foreclosure sales on November 1, 1988 and a Release of any claim to set aside, declare void or otherwise attach said foreclosure sales. Said Release will be in a form acceptable to Bankers First and the Trustee.

TRUSTEE'S FEES AND EXPENSES: The Trustee's attorney's fees and expenses may be paid out of the net proceeds from the sale of the option or the $25,000 payment if the option is not exercised. Said fees and expenses will be paid at such time as the Bankruptcy Court enters an Order allowing their payment by the Estate.

ADVERSARY PROCEEDING: The Trustee will prosecute to a conclusion the case of The Colony Place Company vs. Landor Condominium Consultants, Inc., Doris Bird Harrison, D. Landrum Harrison, and Colony Place Condominium Association, Inc., which is designated as Adversary Proceeding No. 88-1083 in the United States Bankruptcy Court for the Southern District of Georgia.

If this reflects your understanding, please indicate your acceptance in the space provided below.

Very truly yours,

BANKERS FIRST FEDERAL SAVINGS
AND LOAN ASSOCIATION

BY: /s/ Edmond M. Smith VP
Edmond M. Smith, Vice President

AGREED TO AND ACCEPTED BY:

/s/James D. Walker Jr.
JAMES D. WALKER, JR., Trustee in
Bankruptcy for The Colony Place Company

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

IN RE:
THE COLONY PLACE COMPANY
DEBTOR

CASE NO: 88-10819

EXCERPTS OF HEARING
BEFORE THE HONORABLE LAMAR W. DAVIS, JR.
UNITED STATES BANKRUPTCY JUDGE
[February 28, 1990]

APPEARANCES:

FOR [THEMSELVES]:
MR. D. LANDRUM HARRISON
MS. DORIS B. HARRISON
(PRO SE)
1208 COLONY PLACE DRIVE
AUGUSTA, GEORGIA 30907

FOR BANKERS FIRST:
MR. DAVID E. HUDSON
MR. LAWTON JORDAN, JR.
MR. MARK BURGREEN
HULL, TOWILL, NORMAN & BARRETT
TRUST COMPANY BANK BUILDING
AUGUSTA, GEORGIA 30901

COURT REPORTER:
MS. NANCY H. CULPEPPER
CULPEPPER REPORTING SERVICE, INC.
551 GREENE STREET - PATIO LEVEL
AUGUSTA, GEORGIA 30901

[Pages 9-10]:

THE COURT: . . . I think I've got to make a decision whether to set aside the

previous order before I get into the merits of the case, Mr. Harrison. I'm going to limit myself today to that scope.

MR. HARRISON: Yes, sir. We would hope so, because we're not prepared, nor were we before, to try the underlying case. If I may repeat, Your Honor, I intent to call as witnesses for the purposes of cross examination, Mr. Hudson, Mr. Jordan, Mr. Burgreen. . . And I say that for the record to offer them the opportunity to consider whether they should disqualify themselves because they are material witnesses in the case.

MR. HUDSON: We do not expect to disqualify ourselves, Your Honor.

[Pages 14-15, 18]:

MR. HUDSON TO THE COURT: . . . And in fact, the record at that hearing was

made to include all of the depositions which had been taken prior to that time, which included hundreds of pages of exhibits which had been assembled by Mr. and Ms. Harrison . . . . . Then, Your Honor, -at the end of October of 1989, Judge Dalis instructed that all the parties to submit proposed findings and conclusions. That was their second opportunity - - their second bite at the apple to influence the Court as to any issue they wanted to draw the Court's attention to. . . . [The hearing before Judge Dalis] was conducted after notice to the parties and that the evidence at the close of the hearing included all of the depositions and documents that had been assembled by the Harrisons and presented to the trustee. And then after that they had the opportunity to present in writing their proposed findings and

conclusions which was an opportunity to influence the Court.

[Pages 21-22]:

QUESTION TO MR. HUDSON: Is it your policy to send selected portions of the record and other information along with proposed orders?

ANSWER: Yes. I've done it before. I don't do it in every case. There was a voluminous -- as you remember, voluminous documents and several transcripts in addition to the actual hearing that we had in September 18th. So, in situations like that, if we were dealing with a complex record, I have on occasion sent excerpts to judges.

QUESTION: Do you also send them to opposing parties?

ANSWER: . . . I might -- well in fact, I probably -- in the cases where

I've done that, I would send a carbon copy of the letter to other parties in interest. . .

QUESTION: . . . You do send them a copy of the letter that refers to what else you're sending a judge?

ANSWER: Yes. I would say that's my common practice.

[Pages 23-24]:

QUESTION TO MR. HUDSON: Now, let me hand you Plaintiff's Exhibit Number 2, Mr. Hudson, and ask you if you'll follow with me. . . . This, as you know, is the letter that in the motion is contended that violation of Rule 9003 occurred. Now, it indicates that carbon copies went to Mark Burgreen and David Hudson -- David Hudson being yourself, is that correct?

ANSWER: That is --- I am David Hudson.

QUESTION: And is Mark Burgreen also a member of your law firm?

ANSWER: Yes, he is.

QUESTION: Is it common practice in your law firm to send carbon copies of such communication to other lawyers within the firm?

ANSWER: Yes. When there are several of us working on a file, it's a means by which we keep each other apprised of who's done what.

QUESTION: All right, sir. Now, it also indicates a carbon copy to Mr. J. Randall Hall. Do you know who he is?

ANSWER: He's house counsel for Bankers First.

QUESTION: And he's an attorney licensed to practice in the State of Georiga?

ANSWER: He is.

[Page 26]:

QUESTION TO MR. HUDSON: All right, sir. Then it might follow then, on that same day when those two letters were written, by the end of that day, Mr. Burgreen at least knew that Mr. Jordan had sent a letter to Judge Dalis enclosing a copy of proposed order and you would admit that he would've known that he sent a copy of the proposed order to Ms. Harrison, it that not correct?

ANSWER: Well, that might've happened. I think the more likely scenario is that Mr. Jordan told Mr. Burgreen, "You send a copy to the Harrisons, I'll take care of sending a

copy to the judge, because I want to send some excerpts along with it."

[Pages 28-29]:

QUESTION TO MR. HUDSON: The parties didn't know you were sending the letter, did they?

ANSWER: They did not.

QUESTION: The parties didn't know what you sent with the letter, did they?

ANSWER: . . . . The only regret I have is not sending you a copy of the letter so that our client wouldn't be put to the burden of defending this frivolous motion today.

[Pages 40-42]:

QUESTION TO MR. HUDSON: Are you aware that there are certain obvious errors in Judge Dalis' order that he would not -- that a person making a

review of the record would not have made. Are you aware of that?

ANSWER: No, I'm not.

QUESTION: You're not. Are you aware of the fact that Judge Dalis has the parties confused in his order?

ANSWER: I am not.

QUESTION: Have you read the motions [sic] being heard today?

ANSWER: I have read the motion but I have not done anything other than just look at the fact that you raised those same thirty-one grounds.

QUESTION: I see. Now, unlike the way you presented the matter to this judge, what the motion says -- and you're free to refer to the motion if you want to -- is that the wrongdoing -- that is, the ex parte communication -- took place

and as a result of that, the Court was induced to err, and thirty-one examples of error are submitted. Is that not what the motion does?

ANSWER: The motion says that, but that's absolute nonsense.

QUESTION: But, that's what the motion ways, right?

ANSWER: It says that. And you haven't been able to show it.

QUESTION: What if one of the thirty or thirty-one allegations is that he confuses the parties in his order?

ANSWER: It makes no difference to me.

QUESTION: It makes no difference to you?

ANSWER: In the sense that if that was an error, it certainly wasn't induced by anything that was submitted by Bankers First. Perhaps he got confused by something you told him.

QUESTION: It was in your order that you proposed.

ANSWER: You're now saying that there's something that was wrong in our proposed order --

QUESTION: Right.

ANSWER: You contend that.

QUESTION: Well, yes. For the moment,
yes.

ANSWER: I don't know whether there's anything substantial to it. I don't know whether there even is such a thing in the proposed order.

QUESTION: But if that error were carried forward by Judge Dalis, would it not lead one to believe or to suspect that he did not review the record?

ANSWER: No. What it would lead you to believe is that he relied upon the proposed order submitted by one party or the other, which judges quite often do.

[Pages 100-101]:

QUESTION TO MR. JORDAN: Now, in referring you again to your proposed order that you sent to Judge Dalis. . . Turn to the last page. Do you find the judge referring there he is -- you're proposing to the judge that he in his order [deny a motion to compel the trustee to abandon]?

ANSWER: Yes, I do.

QUESTION: How does he describe. . . that motion on that page?

ANSWER: It's described as the motion of Doris B. Harrison and Landor Condominium Consultants, Inc.

QUESTION: To require trustee to abandon the rights and so forth?

ANSWER: That's right.

QUESTION: That that motion was a motion brought by Doris B. Harrison as a shareholder of [The Colony Place Company] and by no one else. Would you then say that was a mistake in the order you proposed to Judge Dalis?

ANSWER: Yes. I would say it was, that Landor shouldn't have been in there. . .

[Page 78]:

QUESTION TO MR. BURGREEN: Are you involved in litigation other than this case?

ANSWER: Very little, no.

QUESTION: What do you do for a living?

ANSWER: I am primarily a tax lawyer. Practice mostly in the tax and business area.

QUESTION: So in working with Mr. Jordan on this case you sort of stepped out of your area of expertise. Is that correct?

ANSWER: Yes.

QUESTION: Are you familiar with bankruptcy rule 9003?

ANSWER: I have read it since I -- in preparation for this hearing. I --

QUESTION: Prior to this time you didn't know?

ANSWER: No. But I didn't -- just as a general matter I know that it is not proper to make ex parte contacts on the merits. So that's really no news to me that that rule is there.

QUESTION: Do you recall when you would have learned that rule?

ANSWER: Because I saw it cited in your motion to reconsider this settlement.

[Pages 61-64]:

QUESTION TO MR. BURGREEN: Who would've been the head lawyer with respect to this project?

ANSWER: I would say that would be Mr. Jordan.

QUESTION: Who would've assembled the final package?

ANSWER: I would have, with Mr. Jordan, I believe. I don't recall Mr. Hudson being involved in that. It's possible, but my recollection is that it was Mr. Jordan and myself.

QUESTION: Do you recall highlighting any portions of any cases yourself?

ANSWER: I do not recall that, no. I would not be surprised if they were. I assume we could look in the file, and if they are highlighted I would assume that either I did it or Mr. Jordan did it.

QUESTION: What file would you look in to make that determination?

ANSWER: In the Court's file.

QUESTION: Have you seen those documents in the Court's file?

ANSWER: No.

QUESTION: Now, with respect to the rest of the package, were you involved in the assembling of that material?

ANSWER: Yes, I believe I was involved in assembling all of the material referred to.

QUESTION: Did the material consist of any documents such as letters or agreements or anything like that?

ANSWER: I believe they were. I'm not positive. I believe there were perhaps letters from one party to another, or I know there were portion of the transcripts that were referred to. I believe that there probably were copies of some of the contractual documents, but

I have no independent recollection of any specific document.

QUESTION: With respect to a contractual document, do you recall whether included in the package would have been the entire document or selected pages from the document?

ANSWER: I have no recollection. If the proposed order cited page nine of a lease agreement, I believe that page nine of the lease agreement was probably all that was enclosed.

[Pages 67-68]:

QUESTION TO MR. BURGREEN: Let me hand you this document and see if you can identify that.

ANSWER: This appears to be the proposed order that we sent to Judge Dalis.

QUESTION: Now, on page eight of that, do you find any reference to the testimony of Mr. Tommy Tucker?

ANSWER: Yes.

QUESTION: Is that a cite to the transcript of the record of the September 18th hearing [before Judge Dalis]?

ANSWER: Yes, it is.

TO THE COURT: Your honor, I would ask if the Clerk will produce the original transcript of the September 8th [sic] hearing for brief purposes. . . . The record was in -- the record of this case was inspected some time this past month. . . and the original transcript was in the case file but had never been opened. The seal had not been broken.

[Page 72]:

THE COURT: . . . for the record I'll tell you I've now examined the transcript of the trial held September 18th, 1989, before John S. Dalis and it has not been opened.

[Pages 83-84]:

QUESTION TO MR. JORDAN: Mr. Jordan, I hand you what's been identified as Movant's Exhibit Number 2, which is your letter of October 27th to Judge Dalis. That is, as far as you recall, a correct copy of the letter you wrote him?

ANSWER: Yes, sir. It is.

QUESTION: Now, that letter indicates at that [sic] top it was hand delivered. Did you hand-deliver it.?

ANSWER: No, sir.

QUESTION: Do you know who did?

ANSWER: It would've probably been one of the messenger in our office, but I don't remember for sure.

QUESTION: Do you know to whom -- did he report back to you with respect to whom he delivered the package?

ANSWER: I don't remember him reporting back to me as to whom he delivered the package. I'm sure we got some verification back that it had been delivered.

QUESTION: What kind of verification would that have been?

ANSWER: I would've told my secretary to check and make sure it got delivered, something like that.

QUESTION TO MR. JORDAN: Now, if you'll notice on that letter, there is a reference at the top of it that reads the

reference the Colony Place Company Chapter 7 Case number 188-00819, and the next line says adversary proceeding number 1880083.

ANSWER: Yes.

QUESTION: Can you account for that extra line being there?

ANSWER: No, sir. I can't.

QUESTION: Do you recall dictating the letter?

ANSWER: I recall dictating the letter. She probably took the "Re:" off of the word processor, though.

QUESTION: But the -- so you think it's a typographical error of that type that would've come off the word processor?

ANSWER: I think so, because it's -- I mean, it's clear this is not the adversary proceeding, and I think it's clear from the body of the letter what's involved.

QUESTION: Are you involved in the adversary proceedings?

ANSWER: Bankers First is not a party to it, no.

QUESTION: Does it have any other kind of involvement in that?

ANSWER: We have an interest in the outcome of it, yes.

QUESTION: What is that interest?

ANSWER: Well, part of our settlement agreement with the trustee was that he would prosecute the adversary proceeding to a conclusion.

QUESTION: And at whose expense would that prosecution be conducted?

ANSWER: It's conducted by the trustee at his expense.

QUESTION: Or the estate's expense?

ANSWER: That's correct.

QUESTION: Now, the last paragraph, if you would familiarize yourself or refresh your memory --

[THE COURT]: May I inquire what that adversary proceeding is in caption or just briefly something informative?

[MR. WALKER]: May I address that question, Your Honor?

[THE COURT]: Any problem, Mr. Harrison?

MR. HARRISON: Yes, sir. I have considerable problems, Mr. Walker. If

Mr. Walker wants to take the stand and testify, Your Honor, then we'd be fine. If the Court is asking what that case is about --

[THE COURT]: I don't want to know the merits of the case, I just want to know the caption. May I find out what the caption of the case is? Who the parties are?

MR. HARRISON: The caption of the case would be James D. Walker, Jr., trustee for the Colony Place Company, versus Landor Condominium Consultants, Inc., D. Landrum Harrison, Doris B. Harrison, and Colony Place Condominium Association, Inc.

[THE COURT]: All right. And what relief is the trustee seeking?

MR. HARRISON: To set aside transfers.

[THE COURT]: All right. Thank you.

MR. HARRISON: Just to go a little further since the Court's expressing interest in that matter, the --

THE COURT: Well, I wasn't interested until you brought it up.

QUESTION TO MR. JORDAN: The trans-- with respect to the adversary proceedings, sir, the transfers that trustee seeks to set aside, does Bankers First claim ownership to some of the property in question?

ANSWER: Yes, sir. They do.

QUESTION: So the trustee is trying to clear title [for] Bankers First. Is that not correct?

ANSWER: Well, I think the title is already clear. I think in some situations you seek to obtain what I call double protection, and that is you try to make sure that things are done twice to make sure they're done right.

QUESTION: I can understand that. So, in Bankers First's best interest it would want things done twice or three times, if it would help clear the title to the property.

ANSWER: In certain situations.

QUESTION: Right. In this case the cost of that effort is being borne by the debtor's estate. Is that correct?

ANSWER: Well, I'm not sure that is correct because I think it's being borne by the trustee. I think he's the one that's expended there.

QUESTION: But he would of course be able to seek reimbursement from the estate.

ANSWER: _ If there are funds there, yes.

QUESTION: And under your agreement with the trustee, which this hearing is all about, the agreement Judge Dalis has approved, Bankers First is paying the estate $25,000.00.

ANSWER: Well, no, that's not the agreement.

QUESTION: Well, a minimum of $25,000.00.

ANSWER: The estate will get a minimum of $25,000.00 under any circumstances. That's correct.

QUESTION: So the estate gets money out of the agreement?

ANSWER: That's correct.

QUESTION: Out of which the trustee gets paid for his efforts on Bankers First's behalf.

ANSWER: Upon proper application to the Court and all the things that must transpire.

QUESTION: Thank you.

[Pages 92 - 93]:

QUESTION TO MR. JORDAN: Do you recall highlighting, in the sense of with a magic marker, any portions of the package you sent to Judge Dalis with your letter of October 27th?

ANSWER: I don't recall doing it personally, but I think it would -- I

think we did it in our office. Yes, sir.

QUESTION: Well, who would've made the decision to highlight one paragraph say as opposed to another?

ANSWER: I would've made that decision.

[Pages 96 - 98]:

QUESTION TO MR. JORDAN: Do you do much in the way of litigation, Mr. Jordan?

ANSWER: I do a limited amount of litigation. I do not do litigation on a regular basis.

QUESTION: What kind of work do you do primarily?

ANSWER: I do work in the commercial area. Different business type practice, you might say.

QUESTION: When did you first become aware of bankruptcy rule 9003?

ANSWER: I'm not sure, Mr. Harrison.

QUESTION: Would it have been recent or a long time ago or --

ANSWER: Well, I know the general philosophy that's embodied in that rule. And I know there's a rule of that nature in bankruptcy court. I think you referred to the ex parte communications.

QUESTION: Yes. Right. So you were aware of the prohibition against ex parte contacts?

ANSWER: Yes.

QUESTION: Now let me ask you, Mr. Jordan; I'm going to read you a statement and ask you if in your opinion it is a correct statement concerning what

transpired with respect to your October 27th letter. Now, I'm going to ask you, if the statement's not correct as far as you're concerned, to tell me what's wrong with it, please. On October 27th you sent a proposed order to an undecided judge along with selected portions of the evidence behind the backs of opposing parties.

ANSWER: Mr. Harrison, we'd have to go through one by one. I don't know whether the judge was undecided or not.

QUESTION: All right, sir. Let me hand you Movant's Exhibit 1, which has been identified as the letter from Judge Dalis to Ms. Harrison and to Mr. Hudson in which he requests that you send him proposed orders. Did you receive a copy of that letter?

ANSWER: Yes.

QUESTION: Can you tell me how you could conclude from reading from that letter that the judge was undecided? Was decided, rather.

ANSWER: I can't conclude either way. I don't know whether he was completely undecided; whether he'd made a preliminary decision and he wanted to get a proposed order from both sides -- I just don't know.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE: THE COLONY PLACE COMPANY,
Debtor

Chapter 7 Case
Number 88-10819

MOTION TO SET ASIDE JUDGMENT

NOW COMES DORIS B. HARRISON, a party in interest, who moves the Court, pursuant to Bankruptcy Rule 9024 (F.R.C.P. 60(b)), to set aside its judgment entered December 1, 1989, in the matter of the Trustee's application to compromise a controversy with Bankers First Federal Savings and Loan Association and movant's motion to compel abandonment, and as grounds therefor shows the Court as follows:

By letter dated October 27, 1989, a copy of which is attached hereto as

Exhibit "A" and made a part of this motion, an attorney for Bankers First Federal Savings and Loan Association intentionally communicated ex parte with the Court concerning this case in violation of Bankruptcy Rule 9003. Neither a copy of the letter nor copies of the documents referred to in the letter (other than the proposed order alone) were served upon or otherwise made available to movant. This unauthorized communication preceded the judgment to which this motion is addressed and was not discovered by movant until after the judgment had been entered.

Attached hereto as Exhibit "B" and made a part of this motion is a copy of Bankruptcy Rule 9003 together with a commentary thereon taken from Collier on Bankruptcy at page 9003-1.

By basing its judgment in whole or in part upon this unauthorized communication, the Court was induced to err in the following particulars:

1. The Court found that the motion to compel abandonment of the claims against Bankers First was brought by two principals of the debtor, D. Landrum Harrison, as its President, and his wife. Movant shows that the motion to compel abandonment was brought by movant, Doris B. Harrison, as a party in interest and by no other party.

2. The Court found that the motion to compel abandonment was brought by movant in order for her to continue an action against BANKERS FIRST now pending in state court. Movant shows that the action referred to was brought as a

derivative action on behalf of the debtor and not on behalf of movant in her individual capacity.

3. The Court found that movant claims that BANKERS FIRST is responsible for failure of the condominium project which was being developed by debtor. Movant shows that no such claim has been made by her. To the contrary, it is movant's contention that the project never failed. Instead, it was arbitrarily and without sound business reasons terminated by BANKERS FIRST in breach of its contract with debtor.

4. The Court found that the debtor requested $700,000 to acquire and develop the property and had projected construction loans of $1,000,000 to build 120 condominium units. Movant shows that

the initial $700,000 was the first installment of a projected peak loan of $1,700,000 against a budget of over $4,000,000, with construction funds to be used on a revolving basis, all as set forth in the original project proposal. Banker First committed the initial $700,000 based upon the proposal and allowed debtor to purchase the land, put in streets, drains and other site improvements including the construction of a clubhouse, all at a cost of within 10% of debtors estimates.

5. The Court found that the project suffered from cost overruns, time delays and slow sales. Movant shows that a careful examination of the existing record and project documents not yet a part of the record by one experienced in such matters would reveal that such factors are typical in any large real

estate development project and in this case were more than offset by increases in sales prices of the condominium units. Bankers First never required loan to value ratios and never even obtained an appraisal as was required by the Federal Home Loan Bank Board. Instead, after debtor was committed to the project by having acquired and developed the land, Bankers First imposed arbitrary cost limitations on construction of the condominium units, limitations which proved to be unreasonable and substantially below what customary loan to value ratios would have warranted even though Bankers First started taking all of the sales proceeds in the beginning, leaving the debtor with no funds of its own. Thus, the project was put under stress from the outset because Bankers First breached its original commitment to

debtor by changing the rules.

6. In its finding of fact the Court overlooks the fact that in October 1987 a new agreement was entered into between Bankers First and the debtor by which Bankers First expressly waived any and all defaults on the part of debtor up to that point. (Exhibit 4, 10/30/87 Loan Agreement). Thus, all references to the performance of the project up to that point are irrelevant.

7. The Court found that "interest was not paid and Bankers First declared the loans in default and initiated foreclosure." The Court made no finding as to whether any interest was due, when it was due or how much was due, or whether any other basis of default existed under the October 1987 agreement or whether Bankers First waived any

defaults that might have existed. The record contains correspondence from the debtor to Bankers First in May and June 1988 in which the debtor vehemently contests the alleged default. (Exhibits 52 and 53). Furthermore, Bankers First had consistently either advanced funds for the payment of interest or waived interest defaults. On at least one occasion, Bankers First waived a portion of accrued interest entirely.

8. The Court felt constrained to make extensive findings concerning the manner in which the attempted foreclosure by Bankers First was stopped in July 1988. Fairness would require a finding that stopping the foreclosure with an emergency bankruptcy petition was not only in the best interest of the debtor and its more than 50 unsecured creditors

but was in fulfillment of movant's duty as an officer, director and shareholder of debtor. The fact that the Trustee and Bankers First are attempting to compromise the debtor's claims in this proceeding is sufficient to justify movant's actions.

9. The Court found that the Trustee conducted an extensive investigation of Harrison's allegations against Bankers First. In fact, the Trustee's investigation consisted only of a cursory review of the Debtor's business affairs. He did not employ the experts needed in forming an opinion concerning the claims of the debtor against Bankers First and he did not possess the experience and knowledge himself.

10. The Court found that the Trustee "negotiated" a settlement. In

fact, no meaningful negotiations took place. As is pointed out below in this motion, the agreement was entered into in haste, the Trustee had no bargaining power because he had made it clear that he would not oppose Bankers First in any event and he lacked the knowledge and experience to negotiate in parity with Bankers First and its several attorneys.

11. The Court found no evidence of the existence of a partnership between Bankers First and debtor. Such a finding in light of the substantial evidence to the contrary, ignores the interests of the unsecured creditors. The Court views the relationship of the parties solely from the point of view of Bankers First who avoids liability to the creditors of the business enterprise by denying the partnership. It is obvious that Bankers

First is well served by disavowing the partnership. For that very reason the relationship between the parties must be viewed objectively from the point of view of a trade creditor. It was general knowledge among debtor's creditors that the venture to which they were extending credit was fully funded by Bankers First. None of the trade debt was guaranteed by principals of the debtor. The October 1987 agreement specifically provided for pro rata payments to trade creditors by Bankers First out of the proceeds from the sale of condominium units, the creditors were informed of that agreement and six such payments were made to the trade creditors from October 1987 to April 1988. (Exhibit 4, 10/30/87 Loan Agreement). A seventh payment was due to be paid out of the last unit sale that took place in May 1988 but Bankers First chose to retain all of the proceeds

instead, contrary to the terms of the agreement. Several creditors extended credit in May 1988 with the express understanding that Bankers First would pay their bills but they were never paid. (9/18/89 Transcript, DLH Testimony). It is a manifest injustice to allow Bankers First to assert its own self-serving documentation in avoidance of the claims of creditors of the joint enterprise. The Court acknowledges that there was an agreement for Bankers First to share in the proceeds of sales but overlooks the fact that under the October 1987 agreement, and in fact since May 1986, Bankers First received 100% of the proceeds of sales, thus, <u>all</u> of the profits. (Trustee's Exhibit 16). Under that agreement debtor received only a monthly allowance for the payment of operating expenses. At no time did

debtor ever receive profits from the enterprise. It is clear that the relationship between the parties was either that of lender-borrower or partners and an objective consideration of all of the facts reveals none of the characteristics of a lender-borrower relationship: debtor had no way of repaying the money advanced by Bankers First except from the operation of the enterprise and only the enterprise stood as collateral. Therefore, the funds advanced to the project by Bankers First, although called "loans," were nothing more that an investment in the project itself.

12. The Court incorrectly found that the debtor's claims against Bankers First are based upon the debtor's inexperience and lack of capital. This theory was first advanced by the Court

from the bench at the hearing in this case held on October 17, 1988, in which the Trustee acquiesced, and has since been adopted by Bankers First in framing its own defense.

It is an established fact that the principals of the debtor had no experience in developing large multi-family housing projects. It is also an established fact that the principals did not have independent financial resources sufficient to permit them to make cash contributions to the project to the extent Bankers First now says they were expected to. (7/22/88 Letter, DLH to Smith). These two factors taken alone serve to substantiate the existence of a partnership between debtor and Bankers First, a partnership that called for the principals of debtor to

contribute their time and skills and for Bankers First to contribute its money, and it is from that relationship that one of several causes of action arises.

The Court also incorrectly found that it is alleged that there was an open-ended agreement for Bankers First to advance funds to the project. There was, however, an agreement for Bankers First to see the project through to completion. Any time it became dissatisfied with how the project was being managed it was free to demand changes. No such changes were ever demanded, however. Instead, Bankers First consistently placed obstacles in the path of the development arbitrarily and without explanation' While debtor, its principals and its creditors depended upon the success of the project, Bankers First showed no interest in the success of the project and acted to the project's

detriment. This was in breach of the agreement between the parties and out of that breach another cause of action arises. It is mere fiction to take what appears to be loan documentation at face value and allow Bankers First to use it as a shield to avoid its legal obligations, especially in bankruptcy court where the interests of all parties are to be considered.

13. The Court found that "the principals made substantial financial commitments to the Colony Place project and were not without funds." Specifically, the Court found that the principals made capital contributions of $36,500 and loans of $104,117. Of the capital contributions, a total of $12,500 was paid in before the land was purchased and the remainder was paid in by four of

the principals with considerable difficulty when Bankers First refused to provide funds for the renewal of the Front Six option in April 1986, the option which Bankers First later exercised. The amount of loans by principals is not correct. Although short term loans were made from time to time by two of the principals to meet emergency cash shortages caused by the withholding of draws by Bankers First, according to the schedules filed in this case two of the principals claim to be now owed a total of $48,513.23, representing loans made by them to debtor. Landor Condominium Consultants, Inc., is owed $35,484.05 but this represents for the most part an account receivable pursuant to its management contract. The important fact is that under the terms of the original agreement between debtor and Bankers First the

principals were not required to make any cash contributions and only ended up doing so because of Bankers First's refusal to live up to its commitments.

The Court has taken out of context a statement made by debtor in a 1985 cash flow forecast. The statement that "any substantial cost overruns will have to be borne by the developer from other than construction draws" is in the context of projected net proceeds to be received by debtor from unit sales which would be debtor's only source of funds. (Exhibit 7, pages 1 and 6). Clearly, the agreement between the parties contemplated that developer's profit would be at risk in the venture. On the facts of this case, it begs credulity to suggest that the principals of debtor could personally absorb any and all cash

short-falls in a multi-million dollar real estate project.

14. The Court found, primarily upon the testimony of the attorney hired by Bankers First to testify on its behalf, that Bankers First met the agreed upon construction advance method of financing the project. This finding is not supported by any credible evidence. Furthermore, it was not made clear from the witness' credentials how he qualified as an expert on methods of construction financing or how he gained knowledge of the debtor's business affairs. In the original commitment, Bankers First agreed to pay the costs as they were incurred. This lasted for nearly a year and proved satisfactory. However, at that point Bankers First changed the method for obtaining draws to a method that ignored reality, proved unworkable and caused

considerable construction delays, credit problems and lost sales. (DLH Deposition).

15. The Court found that Bankers First properly responded to the draw requests. Again, this finding was based upon the testimony offered by the attorney hired by Bankers First to testify. In fact, very few draw requests were responded to in a timely fashion. Local custom and Banker's First's own procedures as applied to other borrowers called for draw requests to be submitted on a Wednesday for disbursement to be made two days later on the following Friday. Draw requests, and thus the disbursement of funds for the project, were handled by personnel at the Davis Road office of Bankers First. Evidence will be introduced in the state court

proceeding which will show that the former president of Bankers First stated under oath, on January 12, 1988, that a 1985 refinancing promotion being handled by the Davis Road office "absolutely buried our back room," and that "the Davis Road office is still trying to dig its way out. As we could not adequately serve our customers, our company was embarrassed by its delays and inability to handle the work in a timely and efficient way." Affidavit of Victor J. Mills in the case of Merry Land and Investment Co., Inc. v. Bankers First Corporation, Case No. 87-RCCV-897, Superior Court of Richmond County, Georgia.

16. The Court found the allegation to be without merit that debtor lost sales as a result of mishandled permanent loan applications, in spite of

the uncontradicted testimony of the person in charge of sales for the project. She testified upon deposition that she knew of three or four sales that were lost and if she knew about that many then it was reasonable to assume there were many more that she did not know about. Neither the Trustee nor Bankers First offered any evidence to rebut this testimony. They produced no witnesses on this point. The Court found inconsequential the hundreds of thousands of dollars that would have been lost in this manner and as a direct result of negligence on the part of Bankers First.

17. The Court found that Bankers First did not improperly exercise the option which the debtor held on the Front Six property. This finding is based upon an incorrect reading of the record. Mr.

Harrison had testified that at the time he notified Bankers First that the debtor would exercise the option he did not know where the money would come from he said he was confident he would find it. Bankers First did not notify the debtor of its exercise of the option until after the fact. When Bankers First sold the property to the debtor after the exercise of the option it received in return a security deed on the property cross-collateralized with the other real property of the debtor, a new loan agreement upon which it based its claim of default six months later and the release upon which it now in part relies plus an additional personal guaranty. Thus, it succeeded in substantially bettering its position vis-a-vis the debtor and its other creditors. In spite of movant's urging, the Trustee never considered this transaction to constitute

a voidable preference.

18. The Court notes the pending state court litigation but found that no evidence has been offered to support the allegations against Bankers First in that lawsuit. Movant shows that the case has not reached the evidenciary stage, that discovery in that case has been halted because of these bankruptcy proceedings and that Bankers First has not sought summary judgment or any other pretrial disposition of the case.

Regarding the allegation that Bankers First violated the automatic stay by foreclosing on the property of the debtor, movant respectfully calls the Court's attention to the fact that an order of this court is not effective until it has been entered by the Clerk.

The order lifting the automatic stay and allowing Bankers First to pursue its state court remedies was announced from the bench on October 17, 1988, signed on October 21, 1988, but was not entered by the Clerk until December. Thus, the order was not effective or a part of any public record on November 1, 1988, when the purported foreclosure sale took place.

Most importantly, the sale was chilled because the order was withheld from public view. The legal ad advertising the foreclosure sale stated that the sale was conditioned upon Bankers First obtaining certain orders from the bankruptcy court. A prospective bidder would not have had notice, actual or constructive, that such orders had been obtained. In fact, Bankers First was given permission by this Court to

advertise the sale subject to both an order lifting the stay and an order of abandonment of the property, the latter never having been obtained.

19. The Court found that "The Harrisons" make other allegations against Bankers First but does not address the specific allegations contained in the complaint in the pending state court action although the complaint is before this court as a part of the record. If the Court intends, in spite of the standard of review set out below in this motion, to rule upon the merits of the pending state court litigation in ruling on the application to compromise, then all of the issues should be addressed, not merely passed off as being "general in nature."

20. The Court found that Mr. Harrison testified that the releases were supported by consideration. To the contrary, Mr. Harrison testified that the consideration for the release dated October 30, 1987, was only partially given due to the subsequent breach of the agreement by Bankers First and that he did not consider the release valid and binding at the time it was signed.

21. The Court found that the Colony Place project "failed" for reasons having nothing to do with Bankers First. Movant shows the Court that the project never failed. Instead, Bankers First chose to terminate the project unilaterally in May 1988. By that time all construction had been finished on the first phase and there were no plans for further construction. All that remained was the

sale of the inventory of units. Six sales were closed between October 1987 and May 1988 from which Bankers First received all of the proceeds. A major marketing event took place in May 1988 which would have alone resulted in several sales during that Summer. There is nothing in the record to indicate any difficulties with the project during this six-month period. The sudden and precipitous move by Bankers First to seize the property in May 1988 reflected extremely poor business judgment and was in violation of both the letter and the spirit of the agreement between the parties.

22. The Court makes reference in its findings to additional losses incurred by Bankers First with respect to its dealings with debtor. Movant shows and the evidence reflects that any loses

incurred by Bankers First were the result of its own conduct. While more funds may have been required to complete the project than had originally been estimated, the value of the project as a result of the efforts of debtor increased to a far greater extent. Never was there less value in the property than what Bankers First claimed was owed it. It was only after the attempted foreclosure sale and the adverse publicity that accompanied it that values began to fall. The percentages that the Court uses in describing the performance of the project do not reflect the facts. The original projection of a peak loan of $1,700,000 that was made in 1984 turned out to be about $300,000 or 17% off. (The $2,300,000 which Bankers First claims is now owing includes the $270,000 to purchase the Front Six and the accrued

interest on that amount). Over the course of the project, unit sales prices increased 45%. And, of course, the value of the Front Six more than doubled. Just prior to the first advertisement of the foreclosure sale, the value of the property was substantially greater that what Bankers First claimed was owed on it. Thus, any loss which Bankers First might ultimately incur on this project will be exclusively the result of its own decision-making.

23. The Court notes that the debtor does not have an attorney to represent it in the state court proceedings. However, Mr. Harrison testified that he was confident that counsel could be retained as soon as the case was rid of the entanglements of bankruptcy court. Moreover, the state court does not require the hiring of counsel and there

is nothing in the record to indicate that the debtor is not competent to prosecute its claims pro se.

24. The Court seems to have admitted into evidence and relied heavily upon the opinion of an attorney hired by Bankers First to testify on their behalf at the hearing. Had movant been competent to cross-examine this witness, his testimony would not have held up. Movant assumed that the Court would be competent to exclude the prejudicial effect of such opinion evidence. However, in light of the weight the Court seems to have given this witness' testimony, movant urges the Court to reconsider.

25. The Court found the option on the Front Six to have value for the

benefit of the estate. This finding is based not upon an appraisal but upon the testimony of a realtor produced by Bankers First to the effect that he thinks he can sell the property during the two-year option period at a profit to the Trustee. His testimony is in direct conflict with previous testimony given by professional real estate appraisers who were also produced by Bankers First in support of their motion to have the stay lifted and when they benefited from a low appraisal. (Transcript 10/17/88 hearing). The Court's finding is also based upon values set forth in the schedules filed by movant on behalf of debtor. Movant suggests that her values, if relied upon at the time, would have shown substantial equity in the property which Bankers First was allowed to foreclose upon and would have prevented the lifting of the stay. There is no

credible evidence upon which it can be found that the option has any value to the estate. In the Trustee's own words, "it is pie in the sky." (Transcript July 5, 1989 hearing).

The Court also found that the subordination of Bankers First's unsecured claim of some $514,000 will benefit the other unsecured creditors. The Court seems to acknowledge that Bankers First has no unsecured claim until the foreclosure sale has been confirmed under Georgia law by noting that petitions for confirmation have been filed. Movant calls the Court's attention to the record which shows that the petitions for confirmation were filed in November 1988 and the hearing on the petitions that was originally scheduled for January 1989 was cancelled by Bankers First and has not been rescheduled.

Logic would seem to require that confirmation be a precondition to approval of the agreement if subordination of Bankers First's claim is to be considered a material part of the consideration being paid to the Trustee for releasing the debtor's legal rights. If the sale is not confirmed the offer to subordinate is worthless. Moreover, if the state court should order a resale of the property, which is very likely considering the chilling factors that surrounded the foreclosure sale, the Trustee's option becomes a nullity.

Movant further shows the Court that the agreement to compromise, which the Court has approved, was put together in a matter of just a few minutes just prior to the October 17, 1988, hearing on the motions to lift the stay and for

abandonment and included the Trustee's not opposing those motions. (Trial Notes 10/17/88 hearing). It was hastily concocted, was a bad agreement to start with and has not improved with age. It places a substantial burden on the estate and gives Bankers First a free way out of a difficult legal position. The agreement should have been rejected by the Court out of hand at the first instance which was July 5, 1989, when it was first called to the Court's attention. Movant challenges any and all interested parties to find one legal precedent for such a compromise in any bankruptcy court in the land. It is totally lacking in merit and movant truly believes that it has received the Court's approval solely because the adversary system upon which truth depends has completely broken down in the case at bar.

26. The Court heard the Trustee to testify that in his opinion there was no valid cause of action against Bankers First. This is in conflict with his previous testimony before this court and his previous statements to Movant.

27. The Court finds as a matter of law that the relationship between Bankers First and debtor was that of lender and borrower, and no partnership or joint venture existed between these parties, citing Hayes v. Irwin, 541 F. Supp. 397 (N.D.Ga. 1982). The Court has misconstrued the cited case which in fact found that a partnership existed between the parties under Georgia law. What the court actually said was:

> Generally speaking, a partnership is a voluntary agreement between two or more

> persons to contribute their money, property, or skill to the operation of a joint business or common enterprise for their common benefit and to divide the profits and bear the losses in certain proportions. [Cites]. .... A partnership may be created for a single venture or enterprise. An agreement to form a partnership need not be in writing, for the true determinant of a partnership is the objective intent of the parties involved. .... [Cites]. .... Determinative factors of a partnership include an agreement to share profits and losses, a joint enterprise, a joint risk, a joint sharing of expenses, a joint right of control over the business, and joint ownership of capital. These factors, taken alone, may not be sufficient to create a partnership, but the presence of several of them creates a strong presumption in favor of a partnership. Hayes v. Irwin, *supra*, at 415. (Emphasis added).

Only slight evidence is necessary to bind parties as partners in their relation to creditors. Swygert Bros. v. Bank of Haralson, 13 Ga. App. 640. The intention of the parties may be shown by

their express agreement or inferred from their conduct and dealing with one another. Jackson v. Jackson, 150 Ga. App. 87. A partner may be the legal result of an agreement notwithstanding an expressed intention not to create such a relationship. Tresler v. McIntyre, 216 S. C. 469. Third persons shall not be bound by any stipulation among the partners themselves, unless actual notice of such stipulation has been given to the third persons prior to their actions. O.C.G.A. Section 14-8-60.

As to the relationship between Bankers First and debtor, it will be shown by the evidence in the pending state court proceedings - as soon as discovery is permitted - that in 1984 when the relationship between the parties began, Bankers First, as a federally insured savings and loan association, was

permitted under then existing regulations to make direct investments in real estate projects. Such direct investments were routinely disguised as loan arrangements to enable the savings and loan to gain the additional advantages that a lender has over third-party creditors. However, in 1985 when the crisis in the savings and loan industry started coming to light the regulations were changed requiring the savings and loans to classify those loans on their books which were actually joint venture-type partnerships. To avoid having to thus classify its "loans" to The Colony Place Company, Bankers First simply changed the rules of the game and started imposing on debtor the requirements that traditionally were applied to straight loans. As history later proved, debtor could not nor could it ever have met normal lending

requirements, primarily because it had no financial resources of its own to contribute to the project. The constant restraints that Bankers First applied to the cash flow needs of the project, beginning in early 1986 and in an attempt to meet changed regulatory requirements of which debtor was unaware, contributed substantially to cost overruns and slow sales.

28. The Court found as a matter of law that there was not a confidential or fiduciary relationship between Bankers First and debtor, and Bankers First had no duty to refuse to make the loan and is not liable to debtor for making the loan. Movant shows the Court that nowhere in the record or in the complaint in the pending state court action has it been suggested by movant or anyone else that Banker First is liable to the debtor for

not refusing to make the loan. As pointed out elsewhere in this motion, while the relative inexperience of the principals of debtor in the development, construction and marketing of multi-family housing - which was known to all parties to the transaction - increased the risk to Bankers First, never have the principals urged their incompetence as the basis of a cause of action against Bankers First. To the contrary, movant and other knowledgeable in the circumstances, have pointed to the success of the venture as evidence of their competence and any failure attributed to the project as evidence of Bankers First's incompetence. As has been said, the cause of action against Bankers First, which the Court is proposing to extinguish, rests upon tort and breach of contract and not upon some

novel theory as has been suggested by Bankers First and the Trustee and, apparently, adopted by the Court.

The Court cites Wagner v. Benson, 101 Cal. App. 3d 27, 161 Cal. Rptr. 516 (1980), for the finding that no duty of care was owed to debtor by Bankers First. What the cited case actually stands for is the basic principal of law, which is firmly implanted in Georgia law, that "in every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. [Cites]. Such a covenant has been implied in the contractual relationship between a borrower and lender. [Cites]. The covenant imposes upon each of the contracting parties the affirmative duty to do 'everything the contract

presupposes he will do to accomplish its purpose.' [Cites]. A breach of this duty may be a tort as well as a breach of the underlying contract." Wagner v. Benson, *supra*, at 520. (Emphasis added). Ironically, the cited case is one often cited for the rapidly emerging concept of lender liability which is nothing more than the application of well-established principals of tort and contract law to the relationship between a lender and its borrower.

The Court also cites, and Mr. Tucker relied heavily upon, the case of Pardue v. Bankers First Federal Savings & Loan Association, 175 Ga. App. 814 (1985), for the proposition that there is "no confidential relationship between lender and borrower or mortgagor for they are creditor and debtor with clearly opposite

interests." That case involved whether Bankers First had a duty to inform its customers of the possible income tax consequences of certain early-payment deals being offered to its mortgagors and bears no similarity to the case at bar. It has been held in a more appropriate context that the relationship of construction mortgagor-mortgagee gives rise to a fiduciary and agency relationship requiring the mortgagee to protect the mortgagor. See, e. g., Prudential Ins. Co. of America v. Executive Estates, Inc., 369 N.E.2d 1117 (Ind. Ct. App. 1977). Moreover, to cite Pardue in the present context would be to beg the question of what the real relationship between debtor and Bankers First was from the outset.

29. The Court finds as a matter of law that the various releases signed on

behalf of the debtor are valid and binding on the debtor in the absence of duress, citing O.C.G.A. Section 13-5-6 and Chouinard v. Chouinard, 568 F.2d 430 (5th Cir. 1978). The Court has misconstrued the law of duress. Economic duress or business compulsion will defeat a contract where it is "attributable to the party against whom duress is alleged." Chouinard, *supra* at 432. In the present case, Bankers First is asserting the affirmative defense of release or waiver based upon the written releases. The debtor is not only asserting that the releases are invalid because they were obtained by duress applied by Bankers First but that the very economic distress in which the debtor found itself was caused by Bankers First. In short, it was wrongful for Bankers First "to create and take

advantage of an untenable situation." Chouinard, *supra* at 433.

Furthermore, as has been pointed out above in this motion, the latest release was signed in October 1987 and the debtor asserts tortious conduct and breach of contract on the part of Bankers First occurring after October 1987 as well as before. Thus, even if the releases are deemed valid the Court has wrongfully concluded that the releases are valid and binding on the debtor with respect to all claims of the debtor from which the Trustee now proposes to release Bankers First.

30. In attempting to apply the standards of review called for in considering an application to compromise a controversy, the Court seems to be under the impression that it has heard

the entire case - both the law and the evidence - of the debtor against Bankers First. Nothing could be further from the truth. Movant was not called upon nor was she competent to try the entire case at the hearing held on September 18, 1989. Indeed, as she understands the standard of review, the Court is not supposed to <u>decide</u> the issues between the parties. But what the Court has in effect done here is to remove the existing lawsuit from the Superior Court of Richmond County and in one day, without the benefit of a jury and without the debtor even being represented, dispose of the entire matter. It is beyond belief that the Court would reach out to such an extent with so little benefit to the bankruptcy estate. The only parties served by the court's usurpation of the judicial process are

the trustee, individually, and, of course, Bankers First.

31. In its Order Approving Compromise the Court states that Landor Condominium Consultants, Inc., is a moving party in the motion to compel abandonment. This is incorrect.

WHEREFORE, upon the foregoing showing of mistake, newly discovered evidence, fraud, misrepresentation and/or other misconduct of an adverse party, movant moves the Court as follows:

(a). For an order compelling Bankers First Federal Savings and Loan Association to respond to this motion by a date certain.

(b). For an order setting a hearing hereon upon notice to all interested

parties.

(c). For an order setting aside the judgment to which this motion is addressed.

(d). For such other and further relief as the Court deems appropriate, including an independent investigation of all matters pertaining to the initiation and administration of this bankruptcy case.

This 8th day of February, 1990.

/s/ Doris B. Harrison
DORIS B. HARRISON, Movant

1208 Colony Place Drive
Augusta, GA 30907
(404) 860-4804

[Exhibit "A" to the motion appears at Page N-1. Exhibit "B" is set out verbatim in the Petition]

UNITED STATES BANKRUPTCY COURT
Southern District of Georgia
United States Courthouse
P.O. Box 1487
Augusta, Georgia 30903

October 2, 1989

Mrs. Doris Bird Harrison
1208 Colony Place Drive
Augusta, Georgia 30907

Mr. David E. Hudson
Attorney at Law
P. O. Box 1564
Augusta, Georgia 30903

RE: The Colony Place Company
Chapter 7 Case No. 88-10819

Dear Mrs. Harrison and Mr. Hudson:

Regarding the application of the trustee to compromise controversy in the above referenced proceeding, I am requesting that each of you submit proposed findings of fact, conclusions of law and order supporting your positions on the motion. The deadline for submitting these proposals to me is Friday October 27, 1989. For your reference, the exhibits admitted into

evidence are available in the clerk's office. By copy of this letter I am notifying all other parties in interest that noted their appearance for the record at the hearing of this request and affording them the same opportunity to submit a suggested order by the deadline.

Sincerely,

/s/John S. Dalis
John S. Dalis
United States Bankruptcy Judge

JSD/jh

cc: James D. Walker, Jr., Trustee
Mr. Jay Sawilowsky
Ms. Susan M. Reimer
Mr. J. Benjamin Kay, III
Mr. Richard Bird

LAW OFFICES
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AUGUSTA, GEORGIA 30913

[Firm members listing omitted]

October 27, 1989

Mr. D. Landrum Harrison
Mrs. Doris Bird Harrison
Landor Condominium Consultants, Inc.
1208 Colony Place Drive
Augusta, GA 30907

Re: The Colony Place Company, Debtor
Compromise of Controversy

Dear Mr. and Mrs. Harrison:

Enclosed is a copy of a proposed order that we delivered to Judge Dalis today.

Very truly yours,

/s/Mark S. Burgreen
Mark S. Burgreen

MSB:hsm
Enc.

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Gail D. Stebbins — William F. Hammond
Mark S. Burgreen — George R. Hall
James B. Ellington — F. Michael Taylor
Wm W. Horlock Jr

October 27, 1989

HAND DELIVERY

Judge John S. Dalis
U. S. Bankruptcy Court
827 Telfair Street
Augusta, Georgia 30903

RE: The Colony Place Company
Chapter 7 Case No. 188-00819
Adversary Proceeding No. 188-0083

Dear Judge Dalis:

As requested in your letter of October 2, we are enclosing proposed

findings of fact, conclusions of law and order supporting our position in the above styled case.

We are providing opposing parties with a copy of this proposed order.

For your convenience, we are enclosing marked copies of the material referred to. Because the record in this case is so massive, this may be of assistance to you. We are also enclosing copies of the authorities cited in this draft.

We have referred to the deposition of D. Landrum Harrison by using the initials DLH followed by the volume number of the transcript, and the deposition of Doris Harrison by using her name. The exhibits to these depositions are referred to as the Trustee's Exhibit. Transcripts are referred to by the date of hearing and documentary evidence

introduced at the 9/18/89 hearing is referred to by the designation used at the beginning of that transcript.

On Page 16 of the opinion, we have stated that the Bankruptcy Court has entered a judgment setting aside the Landor transfers because we understand from Mr. Walker that the Court has orally indicated it will so rule.

Please let us know if you have questions, or need any additional information.

Sincerely,

/s/Lawton Jordan, Jr.
Lawton Jordan, Jr.

LJ,JR:gs
(CPC 26)
cc: Mark Burgreen
J. Randall Hall
David Hudson
Edmond M. Smith

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

IN RE: THE COLONY PLACE COMPANY, Debtor,

JAMES D. WALKER, JR., Trustee.

Chapter 7 Case
Number 88-10819

RESPONSE TO MOTION TO SET ASIDE JUDGMENT

This is the response by Bankers First Federal Savings & Loan Association to the Motion of Doris B. Harrison ("Harrison") dated February 8, 1990 to set aside the judgment approving the settlement between the Trustee and Bankers First. Bankers First received this motion on February 15, 1990. Apparently it was delayed in the mail because inadequate postage was affixed.

Movant Harrison first contends that the attorneys for Bankers First communicated ex parte with the Court because they furnished the Court with

courtesy copies of the portions of the record referred to in their proposed opinion and copies of the cases cited in their proposed opinion.

Bankers First does not believe that providing the Court with copies of the portions of the record and authorities referred to in their proposed opinion violate either the letter or the spirit of the applicable rules. Furthermore, Bankers First does not see how the furnishing of such copies induced the court to err in reaching a decision and does not believe that the court did err in reaching a decision.

In her motion Movant Harrison raises 31 separate grounds. Bankers First respectfully submits that each of these 31 grounds in without merit for two or more of the following reasons:

1. The motion is not timely. In effect Movant's motion is a motion to

amend the judgment but it was not filed within the time period required by Bankruptcy Rule 7052.

2. The allegations were previously raised in one or more previous untimely motions filed by Movant Harrison and have been denied by this court.

3. The matters alleged are irrelevant.

4. The alleged ground is inconsistent with the facts in the record.

5. The alleged ground is inconsistent with the applicable law.

6. The alleged ground refers to documents or other matters not introduced into evidence.

Bankers First respectfully submits that the motion should be denied because it is not timely, but will be glad to submit a detailed brief discussing each

and every ground alleged by Movant Harrison if the court would like for us to do so.

For the reasons set forth above, Bankers First Federal Savings & Loan Association respectfully submits that the motion of Movant Harrison to amend the judgment should be denied.

Respectfully submitted this 21 day of February, 1990.

/s/David E. Hudson By L.J.
DAVID E. HUDSON
STATE BAR NO. 374450

OF COUNSEL:
HULL, TOWILL, NORMAN & BARRETT
Post Office Box 1564
Augusta, Georgia 30913
(404) 722-4481

RULES AND REGULATIONS FOR THE ORGANIZATION AND GOVERNMENT OF THE STATE BAR OF GEORGIA, PART III: CANONS OF ETHICS, CHAPTER 1: CODE OF PROFESSIONAL RESPONSIBILITY:

Ethical Consideration 7-35:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

Disciplinary Standard 60:

> In an adversary proceeding, a lawyer shall not initiate communication or cause another to initiate communication as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
>
> (a) in the course of official proceedings in the cause;
>
> (b) in writing if he simultaneously delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by an attorney;
>
> (c) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by an attorney;
>
> (d) as otherwise authorized by law or by the Code of Judicial Conduct.
>
> A violation of this Standard may be punished by public reprimand.

Ethical Consideration 5-9:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily

> impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to states facts objectively.

Directory Rule 5-102:

Appearance of a Lawyer as Witness for His Client.

> When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

FEDERAL RULE OF CIVIL PROCEDURE 60

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as a just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and

for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs or coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Supreme Court, U.S.
FILED
JUN 30 1993
OFFICE OF THE CLERK

(2)

No. 92-1969

In The

Supreme Court of the United States

October Term, 1992

IN RE: THE COLONY PLACE COMPANY,

Debtor,

DORIS B. HARRISON,

Petitioner,

v.

BANKERS FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, AND JAMES D. WALKER, JR., TRUSTEE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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(706) 722-3301

Attorneys for Respondent
James D. Walker, Jr.,
Trustee in Bankruptcy
for the Colony Place Company

QUESTIONS PRESENTED

The Bankruptcy Court asked the opposing parties to submit proposed findings and conclusions on whether the Trustee's settlement of claims should be approved. Counsel for Respondent Bankers First provided the Bankruptcy Court, but not the opposing party, with courtesy copies of the authorities and pages from the transcripts cited in its proposed order. The proposed order, which cited all of these materials, was served on the opposing party.

The questions presented are whether the factual determinations made by the Bankruptcy Court (that there was no prohibited ex parte communication, and that there was no fundamental unfairness to the Petitioner), and affirmed by the District Court and by the Eleventh Circuit Court of Appeals without opinion were clearly erroneous and whether the Bankruptcy Court abused its discretion in denying the motion to set aside the judgment.

The other question presented is whether the issue stated above involves a departure by the lower Federal Courts so far from the accepted and usual course of judicial proceedings so as to warrant review by this Court on writ of certiorari pursuant to Rule 10 of the Supreme Court Rules.

PARTIES TO PROCEEDING

The caption of the case contains the names of all parties. Bankers First Corporation (publicly held) is the parent company of Respondent Bankers First Federal Savings and Loan Association. Respondent Bankers First Federal Savings and Loan Association has no partially owned subsidiaries.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Opinions Below 1

Rules Involved 1

Statement of the Case 2

Summary of the Argument 7

Argument 9

Conclusion 18

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) 14

Anderson v. Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) 16

Appalachian Power Co. v. AICPA, 80 S.Ct. 16, 4 L.Ed.2d 30, *cert. den'd*, 361 U.S. 887, 80 S.Ct. 158, 4 L.Ed.2d 121 (1959) 17

EEOC v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524 (11th Cir. 1990) 16

Hale v. Ralston Purina Company, 432 F.2d 156 (8th Cir. 1970) 13

In re Colony Place Company, Debtor, James D. Walker, Jr., Trustee v. Landor Condominium Consultants, Inc., Case No. 91-8470 (11th Cir. Oct. 2, 1992) 3

In re Colony Square Co., 60 B.R. 1003 (N.D. Ga. 1986), *aff'd*, 819 F.2d 272 (11th Cir. 1987), *cert. den'd.*, 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988) 10, 12, 13, 14

In re Design Classics, Inc., 788 F.2d 1384 (8th Cir. 1986) 9

In re Securities Group, 926 F.2d 1051 (11th Cir. 1991) 16

In re Wisconsin Steel Co., 48 B.R. 753 (N.D.Ill. 1985) .13, 14

Landor Condominium Consultants, Inc. v. Bankers First Federal Savings and Loan Association, 198 Ga. App. 274, 401 S.E. 2d 305 (1991) 3

Landor Condominium Consultants, Inc. v. Bankers First Federal Savings and Loan Association, 204 Ga. App. 212, 418 S.E.2d 772 (1992) 3

Margoles v. Johns, 660 F.2d 291 (7th Cir. 1981), *cert. den'd.*, 455 U.S. 909, 102 S.Ct. 1256, 71 L.Ed.2d 447-448 (1982) 12, 14

TABLE OF AUTHORITIES – Continued

Page

Marks v. Shell Oil Co., 895 F.2d 1128 (6th Cir. 1990) 16

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 10

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) 12

Pelican Prod. Corp. v. Marino, 893 F.2d 1143 (10th Cir. 1990) 16

Pullman Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) 16

Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) 11

Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) 14

Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982) 14

Toledo Scales Co. v. Computing Scale Co., 261 U.S. 399, 43 S.Ct. 458, 62 L.Ed. 719 (1923) 12

Tucker v. Commonwealth Land Title Ins. Co., 800 F.2d 1054 (11th Cir. 1987) 9

United States v. Adams, 785 F.2d 917 (11th Cir.), *cert. denied*, 479 U.S. 1009, 107 S.Ct. 650, 93 L.Ed.2d 706 (1986) 14

West v. Love, 776 F.2d 170 (7th Cir. 1985) 11

TABLE OF AUTHORITIES – Continued

Page

RULES

Bankruptcy Rule 8013.....1, 16
Bankruptcy Rule 9003.....12, 13
Bankruptcy Rule 9024.....1, 5, 9, 11, 12
Federal Rule of Civil Procedure 60(b)...1, 9, 10, 12, 13
Supreme Court Rule 10.....i, 2, 8, 9, 16, 18

OPINIONS BELOW

The opinions below consist of:

1. A Bankruptcy Court order approving a compromise recommended by the Trustee[1] (H-1);

2. A decision by another Bankruptcy Court Judge denying Petitioner's motion pursuant to Bankruptcy Rule 9024 (which incorporates Fed. R. Civ. P. 60) to collaterally attack and set aside the order approving the compromise (C-1);

3. A decision by the United States District Court reviewing and affirming the decision of the Bankruptcy Court (B-1); and

4. A decision by the Eleventh Circuit Court of Appeals affirming the decision of the District Court without opinion (A-1).

RULES INVOLVED

In addition to the rules cited in the Petition, the following rules apply:

Federal Rules of Bankruptcy Procedure Rule 8013.

DISPOSITION OF APPEALS; WEIGHT ACCORDED BANKRUPTCY JUDGE'S FINDINGS OF FACT

[1] All of the opinions below are contained in the Appendix to the Petition for Writ of Certiorari and the citations in this brief are to that Appendix.

On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankrupcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Supreme Court Rule 10 is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

A. INACCURACIES IN PETITIONER'S STATEMENT OF THE CASE.

Respondents wish to point out an incorrect statement in Petitioner's brief. In her statement of the question presented and also on page 20, Petitioner suggests that cousel for Respondent Bankers First intentionally engaged in prohibited ex parte communication by providing the Bankruptcy Court, but not the opposing party, with copies of the authorities and pages from the transcript cited in its proposed order. This allegation is not correct and is not supported by the record. There was no finding by the Bankruptcy Court of any intentional misconduct by counsel for Respondent Bankers First. On the contrary, the Bankruptcy Court found that while it would have been the better practice to give copies to opposing parties, under the facts in this case, there was no improper ex parte communication (C-35). That finding is fully supported by the evidence and is inconsistent with the statements in Petitioner's brief.

B. NATURE OF THE CASE

This case is one of a series of lawsuits[2] between Respondents and the Petitioner Doris B. Harrison (plaintiff

---

[2] Related litigation includes:

FRAUDULENT TRANSFERS:

Adversary proceeding No. 188-0083 in Chapter 7 Case No. 188-00819 was brought by the Trustee to set aside real property conveyances made by Petitioner and her husband as officers of the Colony Place Company to a company they owned ("Landor") on the grounds that the transfers were fraudulent. A default judgment setting aside these conveyances was affirmed by the District Court, and the 11th Circuit. *In re Colony Place Company, Debtor, James D. Walker, Jr., Trustee, v. Landor Condominium Consultants, Inc.*, Case No. 91-8470 (11th Cir. Oct. 2, 1992).

DISPOSSESSORY CASE:

After obtaining stay relief and foreclosing on its collateral, Respondent Bankers First brought a dispossessory action against the Harrisons and Landor (a company owned by the Harrisons) in the Superior Court of Richmond County, Georgia. A writ of possession was granted. The Harrisons appealed, but the Georgia Court of Appeals dismissed the appeal because it was premature. *Landor Condominium Consultants, Inc. v. Bankers First Federal Savings and Loan Association*, 198 Ga. App. 274, 401 S.E.2d 305 (1991).

1989 STATE COURT LAWSUIT:

In 1989, Landor and Ms. Harrison filed an eleven count lender liability lawsuit against Bankers First in the Superior Court of Richmond County, Georgia. Many of these same allegations were specifically rejected by the Bankruptcy Court in approving the compromise (H-1).

Bankers First's motion for summary judgment was granted and this decision was affirmed by the Georgia Court of Appeals. *Landor Condominium Consultants, Inc. v. Bankers First Federal Savings and Loan Association*, 204 Ga. App. 212, 418 SE.2d 772 (1992).

in Bankruptcy Court), her husband D. Landrum Harrison, and a company ("Landor") owned by the Harrisons. The litigation arose from the Harrisons' failed attempt to develop a condominium project in Augusta, Georgia called Colony Place (H-2).

The Colony Place project was owned by the Colony Place Company (controlled by the Harrisons). Landor was the development manager for the project and Bankers First was the lender (H-2). The project failed because construction schedules were not met, large cost overruns were experienced and sales did not meet projections (H-3 to H-4). Eventually, Bankers First agreed to loan over $600,000 more than the Colony Place Company originally projected was needed to build and sell 120 condominium units (H-24). However, a total of only 48 units were built and only 25 of these units were sold (H-25).

The Harrisons claimed Bankers First was responsible for the failed development of the Colony Place project (H-5). The Trustee investigated and recommended compromise of the Harrisons' claims for an option on part of the Colony Place property, but no less than $25,000 (H-5 to H-6, H-37 to H-38). (Bankers First was willing to settle on this basis to minimize further litigation.)

After the Bankruptcy Court (Judge John Dalis)[3] approved the proposed settlement, Petitioner attempted

---

[3] There are decisions by two United States Bankruptcy Judges in this case. The first decision was a ruling by Judge John Dalis approving the compromise. The second ruling was made by Judge Lamar Davis denying a motion to set aside the order approving the compromise.

to challenge the approval but did not file her motion to amend within the required time (C-19).

Next, Petitioner collaterally attacked the compromise by filing a motion to set aside the compromise in which she asserted virtually the same thirty-one grounds raised in her untimely motion to amend (C-20). This extraordinary relief was sought pursuant to Bankruptcy Rule 9024.

Specifically, Petitioner claimed that Respondents improperly communicated with the Bankruptcy Court (Judge John Dalis) by furnishing courtesy copies of the cases and portions of the transcript cited in a proposed order which Judge Dalis requested from both parties. Therefore (according to Petitioner), the process by which the decision to approve the compromise was reached deprived her of the opportunity to fully and fairly present her case, and was fundamentally unfair to her. Petitioner made these claims even though the proposed order of Respondents was served on her, so she knew exactly what authorities and portions of the transcripts were relied upon by Respondents (B-9, C-36 to C-37).

At the hearing to consider the compromise Petitioner was heard and called her husband, D. Landrum Harrison who testified at length on her behalf (C-14 to C-15). Also, Petitioner was asked by Judge Dalis to present a proposed order. She submitted an order and received a copy of the order proposed by Respondents (C-15 to C-18). The order proposed by Respondents contained the same citations to cases and portions of the transcript which were supplied to Judge Dalis (B-9, C-36 to C-37).

Bankruptcy Judge Lamar Davis denied Ms. Harrison's motion to set aside the judgment for two reasons, holding that:

First, there were no facts to support an allegation of prohibited ex parte communication since everything communicated to the Bankruptcy Court (Judge John Dalis) was cited in the proposed order furnished to Petitioner (C-35 to C-37).

Second, even if a prohibited ex parte communication had occurred, Petitioner failed to meet the burden of establishing that she was entitled to the extraordinary relief sought because she "utterly failed to demonstrate any lack of due process or fundamental unfairness in the process" (C-37 to C-39).

In support of these holdings, Judge Davis found there was "absolutely no evidence presented at the hearing or otherwise in the record" showing that furnishing the Bankruptcy Court (Judge John Dalis) with copies of the cases and transcript pages cited in the proposed order caused the Bankruptcy Court (Judge John Dalis) to rule in a manner that was procedurally unfair (C-39). This finding was based on the undisputed evidence that Petitioner received a copy of the order proposed by Respondents, knew exactly what authorities and portions of the transcript Respondents were relying upon, and that all material cited in the proposed order of Respondents was fully available to Petitioner (C-23, C-25 to C-26).

Judge Davis further found that Petitioner was given the opportunity to present her case in a lengthy hearing (C-14 to C-15). She was permitted to call witnesses, and did call her husband D. Landrum Harrison, who testified

at length on her behalf (C-15). This testimony was allowed "out of an abundance of caution . . . in order to insure that all parties with a colorable right to be heard were afforded that opportunity" (C-21 to C-22). He also found that Petitioner submitted a proposed order to the court (C-18). On the basis of this factual record, Judge Davis held that there was no showing that a prohibited ex parte communication occurred (C-35) and no showing of fundamental unfairness (C-38).

After review on appeal, both the United States District Court for the Southern District of Georgia (Augusta Division) and the Eleventh Circuit Court of Appeals (without opinion) affirmed the decision of the Bankruptcy Court.

In addition, the District Court reviewed the order of the Bankruptcy Court (Judge John Dalis) approving the settlement and ruled that the findings of facts and conclusions of law were supported by the evidence in the record (B-14).

SUMMARY OF THE ARGUMENT

The Petition for certiorari seeks further review of factual determinations and the decision by the Bankruptcy Court (Judge Lamar Davis) denying a motion to set aside a judgment (C-1) which has been reviewed and upheld by both the District Court and the Eleventh Circuit Court of Appeals (A-1, B-1).

Both grounds upon which the Bankruptcy Court (Judge Lamar Davis) denied the motion to set aside the

judgment were correctly decided and fully supported by the evidence.

On the first ground the Bankruptcy Court correctly concluded, based on the facts in this case, that there was no prohibited ex parte communication (C-35).

On the second ground, the Bankruptcy Court also correctly concluded, based on the facts in this case, that there was no showing of fundamental unfairness to Petitioner since she knew exactly the authorities upon which Respondents were relying (B-9, C-36 to C-37) and was given the opportunity to fully and fairly present her case (C-14 to C-15).

On appeal, the applicable standard of review on questions of fact is whether the findings of the Bankruptcy Court are clearly erroneous. The record shows that the findings of the Bankruptcy Court are not clearly erroneous. On the contrary, they are fully supported by the evidence.

A motion to set aside a judgment is an extraordinary remedy. The applicable standard of review on appeal of such a motion is whether the trial court abused its discretion. The record shows there was no abuse of that discretion in the case at bar by refusing to grant the relief sought.

Therefore, the District Court and the Eleventh Circuit Court of Appeals did not err in affirming the decision of the Bankruptcy Court on both of the grounds stated above.

Furthermore, the case is not one which meets the standard for certiorari under Rule 10 of the Supreme Court Rules since it involves a review of factual findings

made by a Bankruptcy Court following the standards which this Court and the lower Federal courts have applied in a number of cases.

Therefore, this is not a case where a United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision". Supreme Court Rule 10.

ARGUMENT

Petitioner seeks to collaterally attack the compromise by her motion to set aside the unappealed judgment pursuant to Bankruptcy Rule 9024 (which incorporates Rule 60(b) of the Federal Rules of Civil Procedure). Rule 60 provides in part:

> On motion and upon such terms as are just, the court *may* relieve a party . . . from a final judgment . . ., for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (*emphasis supplied*)

Rule 60(b), which provides relief from judgments, is an extraordinary remedy. *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054, 1056 (11th Cir. 1987). In the case of *In re Design Classics Inc.*, 788 F.2d 1384, 1386 (8th Cir. 1986) the court said:

> Relief under Rule 60(b) is an extraordinary remedy. It lies with the discretion of the trial court, and its grant or denial may be reviewed only for abuse of discretion. Rule 60(b) relief is not

appropriate as a substitute for direct appeal of a judgment.

Respondents respectfully submit that the decision of the Bankruptcy Court to deny the extraordinary relief sought by Ms. Harrison under Rule 60(b), and the affirmation of this decision by the District Court and Court of Appeals, is correct for each of the reasons set forth below.

A. NO PROHIBITED EX PARTE COMMUNICATION OCCURRED

The Bankruptcy Court (Judge Lamar Davis) was correct in holding that not all ex parte communication is prohibited and that an ex parte communication does not *per se* require a reversal (C-30 to C-35).

In the case of *In re Colony Square Co.*, 60 B.R. 1003, 1018 (N.D. Ga. 1986), *aff'd*, 819 F.2d 272 (11th Cir. 1987), *cert. den'd.*, 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988) the District Court held that:

> Due process requires that a litigant be given notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Ex parte contacts between a judge and a litigant will not always deprive the adversary of these due process attributes. When a party has been given the opportunity to participate actively in a proceeding and is not prejudiced by the ex parte contact, the requirements of due process have been met. . . . "[W]e reject any notion of due process which would place an absolute prohibition on all ex parte contacts or proceedings." (Cits. omitted)

Judge Davis properly found that, under the facts of this case, providing the Bankruptcy Court (Judge John Dalis) with courtesy copies of cases and excerpts from the record cited in the proposed order was not a prohibited ex parte communication since the proposed order citing these cases and pages from the transcript was furnished to Petitioner (C-23). She knew exactly what cases and pages from the record Respondents were relying upon (C-35 to C-37), and had unfettered access to them (B-10 to B-11, C-25 to C-26).

B. NO SHOWING OF FUNDAMENTAL UNFAIRNESS

The Bankruptcy Court (Judge Lamar Davis) also correctly denied Petitioner's motion on the ground that Bankruptcy Rule 9024 requires a moving party to show that the process was fundamentally unfair (C-38). (The Bankruptcy Court found that even if there was a prohibited ex parte communication, Petitioner "utterly failed to demonstrate any lack of due process or fundamental unfairness in the process" (C-38 to C-39).)

In *West v. Love*, 776 F.2d 170, 176 (7th Cir. 1985), the court held:

> . . . West was required to show by *clear and convincing evidence* that the verdict was obtained through misconduct and that the misconduct was of such a nature that it prevented plaintiff from *fully and fairly presenting his case. Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978). (emphasis supplied)

In *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978), the court held:

> One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by *clear and convincing evidence* . . . The conduct complained of must be such as prevented the losing party *from fully and fairly presenting* his case or defense. *Toledo Scales Co. v. Computing Scale Co.*, 261 U.S. 399, 421, 43 S.Ct. 458, 464 67 L.Ed. 719 (1923) . . . . (emphasis supplied)

Thus, an order will not be set aside unless the process was fundamentally unfair. In *Colony Square*, the Eleventh Circuit held:

> Such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair. *See also Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981), *cert. den'd.*, 455 U.S. 909, 102 S.Ct. 1256, 71 L.Ed.2d 447 (1982)[4]

In re Colony Square Co., 819 F.2d 272, 276 (11th Cir. 1987), *cert. denied*, 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988).

In her argument, Petitioner suggests a different standard for setting aside a judgment on the basis of alleged misconduct. She argues, in effect, that a "per se" rule should apply and that it is not necessary to determine whether the alleged misconduct affected the outcome of the case or deprived Petitioner of the opportunity to be

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[4] Petitioner's reliance on *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) is misplaced, because that case involves a discovery dispute and not Bankruptcy Rules 9003 or 9024 or Rule 60(b).

fully and fairly heard. Petitioner cites *In re Wisconsin Steel Co.*, 48 B.R. 753 (N.D.Ill. 1985) for the proposition that there is a blanket prohibition against all ex parte communication. That decision is not on point, however, because in that case counsel wrote an opinion for the Bankruptcy Judge without the knowledge of the opposing parties. In the case at bar the Bankruptcy Judge requested proposed orders from both sides, and the opposing party was given the draft of the proposed order prepared by Respondents. (C-15 to C-16).

Furthermore, Petitioner suggests an application of *In re Wisconsin Steel* and Rule 9003 that is inconsistent with the language of Rule 60 which provides that a "court *may* relieve a party from a final judgment for . . . misconduct . . . " (emphasis supplied). Rule 60 uses the word "may". It does not provide that such relief is automatic or mandatory. See, *e.g. Hale v. Ralston Purina Company*, 432 F.2d 156, 159 (8th Cir. 1970) where the court said:

> Rule 60(b) motions address themselves to the sound discretion of the trial court and will not be overturned absent an abuse of that discretion.

Petitioner's argument is also inconsistent with other decisions of this Court (discussed in quote below) and the lower Federal courts which have repeatedly reviewed matters of this nature on a case-by-case basis instead of applying a "per se" rule as advocated by Petitioner. A quote from the Eleventh Circuit Court of Appeals opinion in *Colony Square*, 819 F.2d 272, 276 (11th Cir. 1987), *cert. den'd.*, 485 U.S. 977, 108 S.Ct. 1271, 99 L.Ed.2d 482 (1988) discusses the standard which has been applied by this Court and the lower Federal Courts in a number of different factual situations involving ex parte communications:

> The fact that a judge allowed a litigant to draft the court's orders without notice to the opposing party does not automatically invalidate these orders, however. *See, e.g. Rushen v. Spain*, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (ex parte communication between trial judge and juror held to be harmless error); *United States v. Adams*, 785 F.2d 917, 920-921 (11th Cir.), *cert. denied*, 479 U.S. 1009, 107 S.Ct. 650, 93 L.Ed.2d 706 (1986) (ex parte conference between judge, witness and government held constitutional) . . . ; *Simer v. Rios*, 661 F.2d 655, 679-681 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982) (ex parte contacts between judge and litigant held not to violate due process). Such orders will be vacated only if a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair. *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir.1981), *cert. denied*, 455 U.S. 909, 102 S.Ct. 1256, 71 L.Ed.2d 447 (1982); *see generally Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 1584-1585, 89 L.Ed.2d 823 (1986).

See also *Simer v. Rios*, 661 F.2d 655, 679 (7th Cir. 1981) where the Seventh Circuit Court of Appeals held:

> (W)e reject any notion of due process which would place an absolute prohibition on all ex parte contacts or proceedings.

It should also be pointed out that to the extent *In re Wisconsin Steel* implies that a "per se" rule exists, that part of the case was rejected in *Colony Square* at both the District Court and Circuit Court levels. 60 B. R. 1003, 1013-1018 (N.D. Ga. 1986); 819 F.2d 272, 273 (11th Cir. 1987).

The cases cited above show that the applicable standard followed by this Court and the lower Federal courts is a case-by-case review *based on the facts* in each case as was done by the Bankruptcy Court (Judge Lamar Davis) in the case at bar.

The facts in this case do not show fundamental unfairness. Petitioner participated in the lengthy hearing on September 18, 1989 at which her husband, D. Landrum Harrison, testified in opposition to the proposed settlement (C-14 to C-15). She submitted a proposed order for consideration by the Bankruptcy Court (Judge John Dalis), and received a copy of the order proposed by Respondents (C-16, C-23). Petitioner knew exactly the authorities and evidence upon which Respondents were relying (C-25 to C-26, C-36). Petitioner had unfettered access to the materials cited in the proposed order submitted by Bankers First (C-25 to C-26).

Furthermore, Petitioner did not appeal from the order approving the compromise and failed to file a timely motion to amend the judgment (although she did file an untimely motion to amend based on virtually the same alleged errors she sought to raise by her motion to set aside the judgment) (C-20).

Therefore, under the facts of this case, Respondents respectfully submit that the Bankruptcy Court (Judge Lamar Davis) correctly concluded that Petitioner did not meet her burden of showing *by clear and convincing evidence* that furnishing the Bankruptcy Court (Judge John Dalis) with courtesy copies of cases and pages from the record referred to in the proposed order deprived Petitioner of the opportunity to fully and fairly present her

case, or resulted in a process that was fundamentally unfair to her.

C. STANDARD OF REVIEW

On appeal the applicable standard of review of findings of fact is whether the findings of the Bankruptcy Court were clearly erroneous. Bankruptcy Rule 8013; *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518, 528 (1985); *Pullman Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66, 78-79 (1982); *see also In Re Securities Group*, 926 F.2d 1051, 1055 (11th Cir. 1991). Respondents respectfully submit that the findings of fact by the Bankruptcy Court were fully supported by the evidence and were certainly not clearly erroneous.

Furthermore, on appeal from an order denying a motion to set aside a judgment, the applicable standard of review is whether the trial court abused its discretion. *EEOC v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 528 (11th Cir. 1990); *Marks v. Shell Oil Co.*, 895 F.2d 1128, 1129 (6th Cir. 1990); *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1145 (10th Cir. 1990). The record in this case supports the finding that Petitioner was not entitled to the extraordinary relief sought and the Bankruptcy Court did not abuse its discretion in denying the motion to set aside the judgment.

Lastly, the Petition does not meet the standards for writs of certiorari set forth in Rule 10 of the Supreme Court Rules. The case does not involve a departure by the lower Federal courts from the accepted and usual course of judicial proceedings as required by Rule 10 of the

Supreme Court Rules. The case involves a review of findings of fact by a Bankruptcy Court and a review of a Bankruptcy Court's decision declining to grant a motion to set aside a judgment. In *Appalachian Power Co. v. AICPA*, 80 S.Ct. 16, 4 L.Ed.2d 30, 32, *cert. den'd*, 361 U.S. 887, 80 S.Ct. 158, 4 L.Ed.2d 121 (1959) (per Brennan, J., as Circuit Justice) the class of cases which will be reviewed by this Court on writ of certiorari are discussed:

> But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts.

CONCLUSION

Respondents respectfully suggest that the Bankruptcy Court correctly denied Petitioner's motion to set aside the judgment for all of the reasons set forth above. Furthermore, the findings of the Bankruptcy Court (Judge Lamar Davis) were fully supported by the evidence and were not clearly erroneous and there was no abuse of discretion in denying the motion to set aside the judgment. Thus, the District Court and the Eleventh Circuit Court of Appeals did not err in affirming the decision of the Bankruptcy Court denying the extraordinary relief sought by Petitioner.

Respondents also respectfully suggest that the case is not one which meets the standards for certiorari set forth in Rule 10 of the Supreme Court Rules since it does not involve a departure so far "from the accepted and usual course of judicial proceedings . . . " as to call for this Court to exercise its supervisory powers.

On the contrary, it involves the review on appeal of a factual determination and exercise of discretion by the Bankruptcy Court, using a procedure and a standard which this Court and the lower Federal courts have followed and applied in a number of cases and which the Bankruptcy Court, the District Court and the Eleventh

Circuit Court of Appeals correctly applied in the case at bar.

For the reasons set forth above, Respondents respectfully suggest that Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RULE 10 OF THE UNITED STATES SUPREME COURT

Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari

to review a judgment of the United States Court of Military Appeals.